DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-6822
Title: Jason Pepper, Petitioner
v.
United States
Docketed: October 2, 2009
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (09-1191)
Decision Date: July 2, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 29 2009	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 2, 2009)
Oct 8 2009	Waiver of right of respondent United States to respond filed.
Oct 15 2009	DISTRIBUTED for Conference of October 30, 2009.
Oct 23 2009	Response Requested. (Due November 23, 2009)
Nov 19 2009	Order extending time to file response to petition to and including December 23, 2009.
Dec 18 2009	Order further extending time to file response to petition to and including January 22, 2010.
Jan 19 2010	Order further extending time to file response to petition to and including February 22, 2010.
Feb 19 2010	Brief of respondent United States filed.
Mar 4 2010	DISTRIBUTED for Conference of March 19, 2010.
Jun 17 2010	DISTRIBUTED for Conference of June 17, 2010.
Jun 21 2010	DISTRIBUTED for Conference of June 24, 2010.
Jun 28 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jul 12 2010	Motion to appoint counsel filed by petitioner Jason Pepper. (CL Page 163)
Jul 14 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 20, 2010.
Jul 22 2010	Adam G. Ciongoli, Esquire, of New York, New York, is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
Jul 28 2010	Motion DISTRIBUTED for Conference of September 27, 2010.
Aug 4 2010	Motion for leave to file volume II of the joint appendix under seal filed by petitioner Jason Pepper. (CL Page 163)
Aug 17 2010	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including August 31, 2010.
Aug 18 2010	Motion DISTRIBUTED for Conference of September 27, 2010.
Aug 31 2010	Brief of respondent United States in support of petitioner filed.
Aug 31 2010	Joint appendix filed. (Statement of costs filed) (Jt. appendix in two volumes) (Vol.2 UNDER SEAL)
Aug 31 2010	Brief of petitioner Jason Pepper filed.
Sep 7 2010	SET FOR ARGUMENT ON Monday, December 6, 2010.
Sep 7 2010	Justice Kagan is recused in this case.
Sep 7 2010	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Sep 7 2010	Brief amicus curiae of Families Against Mandatory Minimums filed.
Sep 7 2010	Brief amici curiae of Federal Public and Community Defenders, et al. filed.
Sep 7 2010	Amendment to Request for Appointment of Counsel filed by petitioner. (Distributed)
Sep 14 2010	CIRCULATED.

Sep 17 2010	The time within which to file the brief of amicus curiae in support of the judgment below is extended to and including October 8, 2010.
Sep 24 2010	Record received from U.S.C.A. for 8th Circuit. (1 envelope)
Sep 28 2010	Record received from U S D C for Northern District of Iowa. (1 envelope)
Oct 4 2010	Motion to appoint counsel filed by petitioner GRANTED. Alfredo Parrish, Esquire, of Des Moines, Iowa, is appointed to serve as counsel for the petitioner in this case. Justice Kagan took no part in the consideration or decision of this motion.
Oct 4 2010	Motion for leave to file volume II of the joint appendix under seal GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Oct 8 2010	Brief of Court appointed amicus curiae in support of the judgment below filed. (Distributed)
Oct 15 2010	Motion for divided argument filed by respondent United States.
Nov 8 2010	Reply of respondent United States in support of petitioner filed. (Distributed)
Nov 8 2010	Reply of petitioner Jason Pepper filed. (Distributed)
Nov 15 2010	Motion for divided argument filed by respondent GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Dec 6 2010	Argued. For petitioner: Alfredo Parrish, Des Moines, Iowa (Appointed by this Court.) For respondent: Roy W. McLeese, Acting Deputy Solicitor General, Department of Justice, Washington, D. C. For amicus curiae in support of the judgment below: Adam G. Ciongoli, New York, N. Y. (Appointed by this Court.)

PETITION FOR WRIT OF CERTIORARI

178 10 No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2008

Supreme Court, U.S.
FILED
SEP 29 2009
OFFICE OF THE CLERK

Jason Pepper,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

The Petitioner has been previously granted leave to proceed *in forma pauperis* five different times in relation to his criminal case and appeals.

On October 23, 2003, and July 8, 2005, the United States District Court for the Northern District of Iowa appointed counsel under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. On May 4, 2004, and June 7, 2006, the Eighth Circuit Court of Appeals appointed appellate counsel under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

On February 12, 2008, the Supreme Court granted Pepper's motion to proceed *in forma pauperis*.

On March 16, 2009, the United States District Court issued the following order regarding Mr. Pepper's fourth appeal to the Eighth Circuit Court of Appeals (*United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009)): "This matter comes before the court on the defendant's motion to appeal in forma pauperis. The defendant filed such motion on February 10, 2009. Based on the financial affidavit submitted by the defendant, the court concludes that waiver of the appellate filing fee is appropriate. To the extent that the defendant now seeks in forma pauperis status because he desires court appointed counsel, the record reflects that defense counsel agreed to represent the defendant on a pro bono basis. Accordingly, the motion to appeal in forma pauperis is granted in part and denied in part."

The undersigned counsel agreed to represent Mr. Pepper on a pro bona basis for his fourth appeal to the Eight Circuit Court of Appeals. It is from the Eighth Circuit's opinion in *United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009) that Mr. Pepper is seeking review form this Court. The petition for a writ of certiorari is being prepared pro bono.

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ATTORNEYS FOR PETITIONER

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2008

JASON PEPPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

There is a conflict among the United States Courts of Appeals regarding a defendant's post-sentencing rehabilitation and whether it can support a downward sentencing variance under 18 U.S.C. § 3553(a).

Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. § 3553(a) after *Gall v. United States*?

Whether as a sentencing consideration under 18 U.S.C. § 3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation.

When a district court judge is removed from resentencing a defendant after remand, and a new judge is assigned, is the new judge obligated under the doctrine of the "law of the case" to follow sentencing findings issued by the original judge that had been previously affirmed on appeal?

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On June 24, 2005, the Eighth Circuit Court of Appeals reversed the judgment of the District Court for the Northern District of Iowa and remanded for resentencing. *United States v. Pepper*, 412 F.3d 995 (8th Cir. 2005) (*Pepper I*). App. 31.[1]

On May 21, 2007, the Eighth Circuit again reversed the judgment of the District Court for the Northern District of Iowa and remanded for resentencing. *United States v. Pepper*, 486 F.3d 408 (8th Cir. 2007) (*Pepper II*). App. 27.

Following the Eighth Circuit's opinion, on or about August 8, 2007, Pepper filed his petition for writ of certiorari in the Supreme Court.

On February 12, 2008, the Supreme Court granted Pepper's petition for writ of certiorari. *Pepper v. United States*, --- U.S. ---, 128 S.Ct. 871, 169 L.Ed.2d 715 (2008). App. 23. The Court ordered the Eighth Circuit's judgment vacated and the case was remanded to the Eighth Circuit for further consideration in light of *Gall v. United States*, 552 U.S. ----, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

Following the remand, On March 11, 2008, the Eighth Circuit again reversed the judgment of the District Court for the Northern District of Iowa and remanded for resentencing. *United States v. Pepper*, 518 F.3d 949 (8th Cir. 2008) (*Pepper III*). App. 19.

On June 9, 2008, Pepper filed his second petition for writ of certiorari.

On October 6, 2008, the Supreme Court denied his second petition for writ of certiorari. *Pepper v. United States*, __ U.S. __, 129 S.Ct. 138, 172 L.Ed.2d 105 (2008).

On July 2, 2009, the Eighth Circuit affirmed the sentence and judgment of the

District Court for the Northern District of Iowa. *United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009) (*Pepper IV*). App. 1.

JURISDICTION

There were two amended judgments in a criminal case entered by the Honorable Chief Judge Linda R Reade in the United States District Court for the Northern District of Iowa, Western Division, on January 5, 2009. App. 7 & 13. Jurisdiction was pursuant to 18 U.S.C. § 3231.

On June 24, 2005, the Eighth Circuit Court of Appeals reversed the judgment of the District Court for the Northern District of Iowa. *Pepper I*, 412 F.3d 995. App. 31.

On May 21, 2007, the Eighth Circuit again reversed the judgment of the District Court for the Northern District of Iowa. *Pepper II*, 486 F.3d 408. App. 27.

On March 11, 2008, the Eighth Circuit again reversed the judgment of the District Court for the Northern District of Iowa. *Pepper III*, 518 F.3d 949. App. 19.

On July 2, 2009, the Eighth Circuit affirmed the sentence and judgment of the District Court for the Northern District of Iowa. *Pepper IV*, 570 F.3d 958. App. 1.

Jurisdiction for the Eighth Circuit was pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

Jurisdiction for the Supreme Court is pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 3231

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[1] "App. __" refers to the attached appendix.

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

18 U.S.C. § 3553(a)

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3742(a)

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

21 U.S.C. § 841(a)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance ...

21 U.S.C. § 841(b)(1)(A)

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—
(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers...

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life ...

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of

> Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

This is one unique case.

On June 27, 2005, Mr. Pepper satisfied his federal 24 month term of imprisonment and began his five years on supervised release. His exemplary conduct on supervised release ranged from college courses and full-time managerial employment, to marriage and the responsibilities of a father, to living a law abiding life.

On January 5, 2009–after three resentencing hearings, two appeals by the government, one appeal by Mr. Pepper, four different opinions by the Eighth Circuit Court of Appeals, and this Court's ruling granting Pepper's petition for writ of certiorari which vacated the Eighth Circuit's judgment and remanded his case for further consideration in light of *Gall*–the district court increased Mr. Pepper's punishment and ordered him back to prison for an additional 41 months. He may finish his additional term of imprisonment before his appeal is decided.

This petition will refer to three different sentencing transcripts and four different appeals to the Eighth Circuit. Throughout this petition the following abbreviations will be used.

"Sentencing Tr." references Pepper's first sentencing in front of Judge Bennett on March 10, 2004.

"Resentencing Tr." references Pepper's resentencing on May 5, 2006, in front of Judge Bennett following *Pepper I*, 412 F.3d 995.

"Second Resentencing Tr." references Pepper's second resentencing on October 17, 2008, and January 5, 2009, in front of Chief Judge Reade following *Pepper II*, 486 F.3d 408 and *Pepper III*, 518 F.3d 949.

On October 1, 2003, Jason Pepper (DOB 4/30/79) was arrested and placed in custody for conspiring to distribute methamphetamine. (Resentencing Tr. p. 19).

Following the filing of the Indictment, and pleading guilty, Pepper appeared for sentencing on March 10, 2004, in front of Judge Bennett.

All parties agreed Pepper had a Guideline offense level of 30 and a Criminal History Category I. Because he was safety valve eligible (and the statutory minimum sentence of ten years did not apply) his Guideline range was 97 to 121 months. (Sentencing Tr. p. 2).

The government filed a substantial assistance motion under U.S.S.G. § 5K1.1 and requested a 15 percent reduction based on the following: (1) upon Pepper's arrest, he timely provided a post-Miranda statement without counsel, (2) he provided a proffer statement with his counsel present, (3) the government was able to use his information before the grand jury, he was a corroborative witness on one defendant that was his source and was a main witness against a second defendant; both defendants were indicted, (4) he was a witness on a gun count, and (5) he was truthful and reliable. *Id.* at 2, 5, 6-9. Also, he had provided information regarding 10 or 11 people involved in drug activity. *Id.*, at 11.

Through defense counsel (and with no objection by the government), Pepper's

background was explained to the judge: When Pepper was 19, his brother passed away; when he was 23, his mother passed away; his parents were divorced; he was somewhat homeless when he became involved in the criminal activity; he very much wanted drug treatment; he was glad he was arrested because it got him away from methamphetamine; and, he had a good academic background and was in the top third of his class. *Id.*, at 9-12, 22. His father was in the courtroom and the judge noted that the father wrote a "very thoughtful letter" and of the thousands of letters the judge had received, it was one of the most thoughtful. *Id.*, at 10. In conclusion, counsel requested a departure so Pepper could get into a boot camp program. *Id.*, at 12. The United States Probation Office also recommended boot camp. *Id.*

The judge replied if Pepper was interested in drug treatment, the 500-hour program at the prison in Yankton, South Dakota, was the best, but Pepper would do more prison time in Yankton then at a boot camp. *Id.*, at 12-14. Pepper requested that he be sent to Yankton so he could get drug treatment. *Id.*, at 15. The government did not object to this request and stood by its initial recommendation. *Id.*

The judge, after placing a call to Yankton, determined he would need to impose at least a 24 month sentence (which would include Pepper's time in custody since October 1, 2003) in order to ensure that Pepper would get drug treatment: anything lower, based on the waiting list, he may not get treatment. *Id.*, at 16-17.

The judge then proceeded to sentencing. Based on the substantial assistance motion and the factors under § 5K1.1, the judge granted the motion, committed Pepper to the federal prison camp in Yankton for 24 months, and requested that he be placed in the

500-hour residential drug treatment program. *Id.*, at 18-19. He would then be on supervised release for five years. *Id.*, at 19. The judge noted Pepper had strong family support, had a lot of promise and potential, and expected him to do very well on supervised release. *Id.*, at 21-22.

On April 12, 2004, Pepper was delivered to the prison at Yankton, South Dakota.

On April 19, 2004, the government appealed Pepper's sentence.

On March 10, 2005, Pepper was released from the prison at Yankton. He immediately went to a halfway house in Council Bluffs, Iowa. (Resentencing Tr. pp. 19-20).

On June 24, 2005, the Eighth Circuit reversed Judge Bennett. The Court found the judge considered a matter unrelated to Pepper's assistance, namely his desire to sentence Pepper to the shortest possible term of imprisonment that would allow him to participate in the intensive drug treatment program at the federal prison in Yankton. *Pepper I*, 412 F.3d at 996, 999; App. 33. The case was remanded for resentencing with instructions to follow the principles set forth in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). *Id.*

On June 27, 2005, Pepper was released from the halfway house and moved to an apartment. (Resentencing Tr. pp. 19-20). He then began serving his five years of supervised release.

On May 5, 2006, the case returned for resentencing in front of Judge Bennett.

Prior to resentencing, counsel for Pepper filed a motion with the district court requesting a deviation from the advisory Guidelines sentence based on *Booker*. Counsel requested a deviation from the Guideline sentence based on Pepper's post-offense

rehabilitation, his substance abuse issues were resolved, he was no longer a risk to the community, and the sentencing disparities that occur due to the availability of the drug treatment programs in the BOP.

At the resentencing hearing three witnesses testified, Pepper, his father, and his United States probation officer.

Pepper testified his life had turned around after receiving drug treatment and after his release from prison. (Resentencing Tr. pp. 19-28). He had started work at MCI, but had to stop due to lack of transportation. *Id.*, at 25-26. He found another job. *Id.*, at 23, 25-26. In the fall of 2005, he enrolled and attended a community college. *Id.*, at 23. He was working part-time and was a full-time student. *Id.*, at 26. He received straight A's in the fall semester and had received a congratulatory letter from the dean of students. *Id.* at 24-25. He had no problems while on pretrial release. *Id.*, at 26-27. While at Yankton, he participated in the drug treatment program, but never received the one-year credit off his sentence because he was not there long enough. *Id.*, at 20-23.

Pepper's father testified he had a very strained relationship with his son the five years prior to his arrest. *Id.*, at 32. Following his son's arrest, they began communicating again and reestablished their relationship. *Id.*, at 33. He testified his son no longer uses drugs or alcohol. *Id.*, at 34. His son had matured and was making plans for the future. *Id.* In addition, the drug treatment program at Yankton truly sobered him up and changed his way of thinking. *Id.*, at 34-35.

Finally, Probation Officer Chad Zach testified. To help prepare the judge for resentencing he had prepared a confidential "Memorandum" regarding the sentencing

factors of 18 U.S.C. § 3553(a) and he recommended a 24 month sentence. *Id.*, at 37, 39. The judge adopted as his findings of fact the recommendations contained in the "Memorandum" and the testimony of Pepper and his father. *Id.*, at 85, 87.

Through his testimony and "Memorandum" Mr. Zach explained why a 24 month sentence was reasonable and identified the mitigating factors that warranted his recommendation for a limited downward variance under 18 U.S.C. § 3553(a) in conjunction with the substantial assistance reduction. *Id.*, at 40-44. Based on his experience, Mr. Zach believed a 24 month sentence was sufficient to protect the community and that Pepper had learned his lesson. *Id.*, at 44. The sentence was justified because since his release from prison over the preceding year, Pepper had shown the judge he could do remarkably well in the community. *Id.*, at 44.

Through his testimony and "Memorandum" Mr. Zach explained Pepper had: (1) been cooperative and compliant with all conditions of release, (2) had been actively employed, (3) had been enrolled in college courses, achieved a 4.0 grade point average and was placed on the President's List, (4) had been subject to random urinalysis and all tests had been negative, and, (5) had reestablished his relationship with his father. (Memorandum pp. 1, 5).

Mr. Zach evaluated for the judge and parties the 18 U.S.C. § 3553(a) sentencing factors that warranted a variance. Mr. Zach found pursuant to 18 U.S.C. § 3553(a)(1) (history and characteristics of defendant) that Pepper had no history of violence. (Memorandum p. 1). He had significant alcohol and drug abuse since age 18 and sold drugs to support his addiction, but had no substance abuse treatment prior to the instant

offense. *Id.* He had been drug free since his arrest in October 2003. *Id.* He had attempted suicide after his brother's death in 1998. *Id.* He was unemployed in 2000 to help take care of his ailing mother who suffered from cancer. *Id.* He was homeless after his mother died in 2002. *Id.* He had a distant relationship with his father. *Id.* In addition, he had been compliant while on supervised release by maintaining employment, had no positive drug tests, and was a model full-time college student. *Id.*

Mr. Zach found pursuant to 18 U.S.C. § 3553(a)(2) that Pepper had a minimal criminal history and had a low probability to commit future crimes. *Id.* Based on his experience, and discussions with Pepper's supervising probation officer, Pepper was considered a low-risk offender. (Resentencing Tr. p. 41).

Mr. Zach found pursuant to 18 U.S.C. § 3553(a)(6) (need to avoid disparities among defendants) that one of Pepper's codefendants received a 26% reduction in his sentence, one codefendant received a 70% reduction and the government withdrew its appeal regarding his sentence, and one codefendant received a 50% reduction in his sentence and the government did not appeal. (Memorandum pp. 3-4).

Mr. Zach concluded:

> When considering the pre-sentencing variance factors, the Court may look to several mitigating factors such as: the defendant has no history of violence; he was a drug addict who sold drugs to support his addiction; the two main supports in his life passed away (brother passed away in 1998 and his mother passed away in 2002) and it appears the defendant became unstable, which fueled his drug addiction; and sentencing disparities with two of the codefendants (Alexander Blankenship received a 70% substantial assistance reduction, which the government initially appealed but later dismissed and, Felipe Sandoval received a 50% substantial assistance reduction that was not appealed by the government).
>
> In addition to the pre-sentencing variance factors, this is a unique remand

> sentencing because the defendant appears to have post-release mitigating factors since his release on June 27, 2005. Since his release, the defendant has taken positive steps in becoming a law abiding citizen. He has maintained employment and is a full-time college student where he achieved a 4.0 last semester, making the President's List. The defendant has also reunited his relationship with his father. Although the defendant had a serious drug addiction, it appears he has taken the appropriate steps to maintain a lifestyle of sobriety by completing the Bureau of Prison's 500-hour drug treatment program; however he did not receive any reduction off his sentence because he did not have enough time to serve and was released to a halfway house after he completed the program. The defendant has also complied with all conditions of his supervision. Although each offender is unique, I do not believe the defendant has the demeanor to commit future crimes and, therefore, his risk to the community appears to be minimal.
>
> In light of the noted mitigation factors, it appears that a limited downward variance may be warranted under 18 U.S.C. § 3553(a). If the Court concurs, a 24 month sentence (same as original sentence) would appear reasonable in conjunction with the substantial assistance reduction.

Id., at 5.

Judge Bennett then imposed Pepper's sentence. The judge concluded he would depart 40% for substantial assistance, which would take Pepper's sentence down to 58 months. (Resentencing Tr. pp. 83-84). To arrive at the 40% reduction the judge explained how he was relying on Eighth Circuit precedent, how he relied on his discussions with other federal district court judges from around the country, that Pepper was very timely, was incredibly truthful and candid, had been debriefed, engaged in a proffer, and had engaged in grand jury work. *Id.*

The judge then moved to the issue whether the facts and circumstances of Pepper's case warranted a variance from the 58 month sentence. The judge decided he did and varied down to 24 months. *Id.*, at 85, 87. The judge took seven transcript pages to explain the specific reasons the 34 month variance was warranted for Pepper's "exceptional" case.

(Resentencing Tr. pp. 85-91).

The judge found Pepper's case was "exceptional," that he had no history of violence, and that there would be a sentencing disparity between Pepper and his codefendants if Pepper did not receive a variance. *Id.*, at 85-86. Specifically referencing the purpose of 18 U.S.C. § 3553(a)(2), the judge was convinced that Pepper had an "extremely low risk of recidivism" based on all the defendants he had seen. *Id.*, at 87. The judge felt obliged to consider Pepper's post-release conduct and how well Pepper had done since his release from prison. *Id.*, at 88-89. The judge justified this consideration by recognizing the other side of the argument, if Pepper had been out committing crimes it would be an important sentencing factor to consider during resentencing and believed that the government would advocate such a position. *Id.*

On June 5, 2006, the government appealed Pepper's sentence.

On May 21, 2007, the Eighth Circuit Court of Appeals again reversed and remanded Pepper's sentence. *Pepper II*, 486 F.3d 408; App. 27. The Court found Judge Bennett did not abuse his discretion by departing 40% for substantial assistance. *Id.*, at 411; App. 28. The Court reversed and remanded because it did not agree with the judge's 34 month downward variance and the judge failed to balance the other factors in § 3553(a). *Id.*, at 413; App. 29-30. Additionally, since Judge Bennett expressed a reluctance to resentence Pepper again if the case was remanded, the case was to be reassigned to a different sentencing judge. *Id.*, at 413; App. 30.

On May 21, 2007, the case was reassigned from Judge Bennett to Chief Judge Reade.

On July 18, 2007, Judge Reade ruled that during the second resentencing hearing the "court will not consider itself bound to reduce the Defendant's advisory Sentencing Guidelines range by 40%, pursuant to USSG § 5K1.1." *United States v. Pepper*, 2007 WL 2076041 *4 (N.D. Iowa 2007); App. 24.

On February 12, 2008, the Supreme Court granted Pepper's petition for writ of certiorari and ordered the case remanded for further consideration in light of *Gall*. *Pepper*, 128 S.Ct. 871; App. 23

On March 11, 2008, the Eighth Circuit again reversed Judge Bennett and remanded for resentencing in front of a different judge. *Pepper III*, 518 F.3d 949; App. 19. In light of *Gall*, the Court found Judge Bennett committed procedural error in failing to adequately explain with sufficient justifications his conclusion that a 59% variance after the § 5K1.1 downward departure was warranted. *Id.*, at 952; App. 21-22. The Court found the judge provided insufficient explanation of the "no history of violence" factor. *Id.* The Court found the judge did not adequately explain and support his rationale for sentencing Pepper to 24 months' imprisonment in contrast to Pepper's co-defendants. *Id.* In addition, the Court found the judge gave significant weight to Pepper's post-sentence rehabilitation, which is an impermissible factor to consider in granting a downward variance. *Id.*, at 952-53; App. 21.

On October 17, 2008, the second resentencing began. Pepper had been out of prison for nearly three and a half years. He had been on supervised release and had exhibited exemplary behavior.

At the start of the hearing Judge Reade told the parties of her intention to hold off on

the imposition of the sentence until a later date:

> I just would like to clarify for all of you so you kind of know what my thinking is about how to attack this very difficult resentencing, difficult because of the number of prior sentencings, difficult because of the number of prior Eighth Circuit opinions on this case, and difficult because, as you know, this is the only case out of the related cases that I'm going to be sentencing which raises some other issues when you apply the 3553 (a) factors.
>
> So I think the fairest thing to do today is to take all the argument, all the evidence, and then I do intend to write on this one because it is so complicated, and I do want an opportunity to weigh, sift, and evaluate everything I hear today, everything I've read. That would require that we get back together for the actual imposition of sentence. And I know that is an inconvenience, but I think it's worth the extra effort so that this Court can do the very best job possible in trying to reach a disposition.

(Second Resentencing Tr. pp. 4-5).

During the hearing it was established Pepper was 29 years old and had been married in May 2007. *Id.*, at 28, 44. His wife had a seven-year-old daughter, who was in the second grade, and she considers him the only father she has ever known. *Id.*, at 44-45. He is a primary source of family support.

Pepper was attending school full-time and studying business management at Parkland College in Champaign-Urbana, Illinois. *Id.*, at 22, 24-27, 44, Exhibits D & E. He was employed at Sam's Club the past two years and according to the Club Manager and Overnight Assistant Manager, Pepper was an exemplary employee and considered for promotion to manager in January 2009. *Id.*, at 22, 24-27, 44, Exhibits A & B. He was named associate of the year at the Sam's Club and had been working as the night supervisor. *Id*

Pepper requested a downward variance to a term of 24 months' imprisonment. This was Pepper's original term of imprisonment which he had served. In his "Request for

Variance" and in his "Second Resentencing Memorandum" pp. 2-3, 15-28, he requested a variance because of (1) his age at the time of the offense, (2) his lack of a criminal record, (3) his lack of a violent history, (4) his drug addiction at the time of the offense, (5) his extra-ordinary and genuine post-offense and sentencing rehabilitation, (6) the need to avoid disparity among co-defendants, (7) the costs of incarceration, (8) his exemplary behavior on supervised release, (9) his continued cooperation, (10) his remorse, (11) his family obligations, and (12) what is just.

On December 22, 2008, Judge Reade filed her sealed sentencing memorandum. Based on the exact same facts that Judge Bennett had relied on to award a 40% reduction for substantial assistance, Judge Reade only awarded Pepper a 20% reduction for assistance. (Second Resentencing Tr. pp. 8-10; Sealed Sentencing Memo pp. 8-10, 26). She also denied every downward variance request. (Sealed Sentencing Memo p. 26).

On January 5, 2009, more than five years after his arrest, Judge Reade imposed Pepper's sentence. First, the judge addressed the remand and sentenced Pepper to 77 months in the BOP and 12 months of supervised release. (Amended Judgment p. 2); App. 7-8. Then the judge granted the government's Rule 35(b) motion and departed 15% from the 77 month sentence to a final sentence of 65 months. (Amended Judgment p. 8); App. 13-14. The judge requested that the BOP give him credit for his completion of the drug treatment program. *Id.* The judge permitted him to self-surrender to the BOP. *Id.*

Pepper appealed the judgment. On July 2, 2009, the Eighth Circuit affirmed the district court. *Pepper IV*, 570 F.3d 958; App. 1.

This petition follows.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THE EIGHTH CIRCUIT FAILED TO REQUIRE THE DISTRICT COURT TO FOLLOW ITS OWN REMAND AND THE LAW OF THE CASE.

The Eighth Circuit ruled that during Pepper's third resentencing the newly assigned judge was not bound to follow the original sentencing judge's findings regarding a departure for substantial assistance even thou the Eighth Circuit twice before affirmed the original sentencing judge's findings on this issue.

The Eighth Circuit ruled:

> We used the following remand language in the conclusion of Pepper III: "For the foregoing reasons, we again reverse and remand Pepper's case for resentencing consistent with this opinion. As the district court expressed a reluctance to resentence Pepper again should the case be remanded, we again remand this case for resentencing by a different judge." *Pepper III, 518 F.3d at 953.* Pepper III's remand language is nearly identical to the remand language in Pepper II. See *Pepper II, 486 F.3d at 413* ("For the reasons stated, we reverse and remand this case for resentencing consistent with this opinion. The district court expressed a reluctance to resentence Pepper again should this case be remanded. Thus, we remand Pepper's case for re-sentencing by a different judge.").
>
> In the district court's Remand Order, which was reaffirmed by the district court in the Sentencing Order, the district court explained, "The only specific restrictions on the court's decision on remand were (1) the second resentencing hearing should take place before a different judge and (2) such judge's decision should be 'consistent with [*Pepper II*].'" The district court observed that while our court "indicated that a 40% downward departure was not an abuse of discretion[,]" we did not "hold that a 40% downward departure [wa]s the only reasonable outcome for [Pepper] or that the [district] court must impose a 40% downward departure on remand pursuant to *USSG §5K1.1.*"
>
> We agree with the reasoning of the district court. Our remand was a general remand for resentencing. Our opinions in Pepper II and Pepper III did not place any limitations on the discretion of the newly assigned district court judge in resentencing Pepper. We did not specify the district court's

> discretion would be restricted to considering whether a downward variance was warranted, nor did we specify the district court would be bound by the 40% downward departure previously granted. We concluded a 40% downward departure was not an abuse of discretion. In other words, a 40% downward departure was within the range of reasonableness. Under the circumstances of Pepper's case, a complete resentencing without any restrictions on the district court's discretion was preferable, in contrast to a partial, piecemeal resentencing limiting the sentencing judge's discretion. We conclude neither the scope of our remand, nor the law of the case doctrine, required the district court to grant Pepper a 40% downward departure for substantial assistance.

Pepper IV, 570 F.3d at 963-64; App. 3-4.

When tracing the way the departure issue progressed through two sentencing hearings and three opinions by the Eighth Circuit, it is clear the Circuit failed to follow the "law of the case" doctrine when it affirmed the district court's 20% downward departure. This was inconsistent with either the express terms or the spirit of the remand of *Pepper III*.

The law of the case is an amorphous concept. *Arizona v. California*, 460 U.S. 605, 618 (1983). As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Id.* Law of the case directs a court's discretion, it does not limit the tribunal's power. *Id.* The law of the case doctrine was understandably crafted with the course of ordinary litigation in mind. *Id.*, at 618-19. Such litigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which, after appeal, the binding finality of res judicata and collateral estoppel will attach. *Id.* Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice. *Id.*, at 618, n.8.

The controversy here focused on the obligation of the newly assigned judge (Judge Reade) on remand. Based on the scope of the remand by the Eighth Circuit in *Pepper III*, and the law of the case, the new judge was obligated to reduce Pepper's advisory Sentencing Guidelines range by 40% pursuant to U.S.S.G. § 5K1.1 and not make her own independent findings regarding the substantial assistance issue. When the Eighth Circuit ruled that the original sentencing judge (Judge Bennett) did not abuse his discretion by the 40% 5K1.1 departure, this became the law of the case and should have been followed. *Pepper II*, 486 F.3d at 411; App. 28.

On remand, Chief Judge Reade ruled that it would not consider herself bound to reduce Pepper's advisory Sentencing Guidelines range by 40% pursuant to U.S.S.G. § 5K1.1 (*Pepper*, 2007 WL 2076041 *4; App. 25-26) and only reduced his sentence by 20%. Her departure finding was based on the exact same facts and considerations that Judge Bennett had already used to arrive at a 40% 5K1.1 reduction. Judge Bennett's findings were affirmed by the Eighth Circuit in *Pepper II*, 486 F.3d at 411; App. 28.

Judge Reade's independent findings to award a 20% 5K1.1 reduction was inconsistent with the express terms or spirit of the remand and contrary to the law of the case. The judge relitigated and reopened a settled issue. The Eighth Circuit affirmed these actions. The "law of the case" was not followed. The law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *Messenger v. Anderson*, 225 U.S. 436, 444 (1912).

The remand by *Pepper II* and *Pepper III* did not permit Judge Reade to operate on a

clean slate, opening up every issue on resentencing. *See United States v. Santonelli*, 128 F.3d 1233, 1237 (8th Cir. 1997). Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue that it could have heard at the first hearing. *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992). To determine the scope of the remand, the Eighth Circuit's conclusory statements regarding the remand must be read with the analysis offered in the opinion. *Santonelli*, 128 F.3d at 1237.

In *Pepper III*, the conclusion of the Court was:

> For the foregoing reasons, we again reverse and remand Pepper's case for resentencing consistent with this opinion As the district court expressed a reluctance to resentence Pepper again should the case be remanded, we again remand this case for resentencing by a different judge, pursuant to our authority under 28 U.S.C. § 2106. The chief judge of the district court shall reassign this case, in the ordinary course, for resentencing by another judge.

Pepper III, 518 F.3d at 953 (internal citations omitted); App. 22.

Pepper III found Judge Bennett considered improper variance factors at sentencing and committed procedural error in failing to adequately explain with sufficient justifications his conclusion that a 59% variance was warranted after the § 5K1.1 downward departure. *Pepper III*, 518 F.3d at 952; App. 21. Thus, *Pepper III* affirmed Judge Bennett had properly calculated the Guideline range and made the proper 5K1.1 departure. It was only after this point that Judge Bennett committed the procedural error with his justifications for the variance.

The mandate to the new sentencing judge from *Pepper III* was specifically limited to resentencing regarding appropriate variances under 18 U.S.C. § 3553(a) and *Gall*, not to relitigate the 5K1.1 downward departure. The only issue in *Pepper III* was *Gall*'s impact on

Pepper's case (*Pepper III*, 518 F.3d at 950), not the propriety of Judge Bennett's 5K1.1 downward departure.

Pepper III twice affirmed that the 40% 5K1.1 downward departure was the law of the case and the only issue to be decided on remand was the variances under 18 U.S.C. § 3553(a) and *Gall*. The *Pepper III* Court discussed *Pepper II*, 486 F.3d at 410, 411, 413, and stated:

> From *Pepper II* we know ...[o]n remand, the district court found Pepper's assistance merited a 40% § 5K1.1 downward departure, which reduced the bottom of the advisory sentencing Guidelines range to 58 months. Then, under 18 U.S.C. § 3553(a), the district court granted a downward variance of 59%, based on Pepper's post-sentencing rehabilitation, lack of violent history, and, to a lesser degree, on the need to avoid unwarranted sentencing disparity among co-defendants. The district court again imposed a sentence of 24 months imprisonment. We found the district court did not abuse its discretion by the extent of the § 5K1.1 downward departure. We did find "[t]he district court impermissibly considered Pepper's post-sentence rehabilitation, and further erred by considering Pepper's lack of violent history, which history had already been accounted for in the sentencing Guidelines calculation, and by considering sentencing disparity among Pepper's co-defendants without adequate foundation and explanation."

Pepper III, 518 F.3d at 950-51(internal citations omitted) (emphasis added); App. 20. Then when discussing Judge Bennett's sentencing findings the Court stated:

> The district court erred because, to the extent the district court explained Pepper's sentence at all, the district court predominantly considered improper factors. Put another way, the district court committed procedural error in failing adequately to explain with sufficient justifications the court's conclusion that a 59% variance after the § 5K1.1 downward departure was warranted in this case.

Id., at 952 (emphasis added); App. 21.

Pepper III never ruled that Judge Bennett's findings regarding the 40% 5K1.1 downward departure were error as it had in *Pepper I*. *See id.*, 412 F.3d at 996, 998-99;

App. 32-33.

It is from the resentencing on May 5, 2006, following *Pepper I*, that Judge Bennett awarded the 40% 5K1.1 downward departure which became the law of the case. On remand Judge Bennett concluded that he would depart 40% for substantial assistance, which would take Pepper's sentence down to 58 months. (Resentencing Tr. pp. 83-84). To arrive at the 40% reduction the Judge explained how he was relying on Eighth Circuit precedent, how he relied on his discussions with other federal district court judges from around the country, that Pepper was very timely, was incredibly truthful and candid, had been debriefed, engaged in a proffer, and had engaged in grand jury work. *Id.*

The government appealed following the resentencing. The Court of Appeals in *Pepper II* stated:

> This case returns after a remand to the district court for resentencing. In *United States v. Pepper*, 412 F.3d 995, 999 (8th Cir. 2005) (*Pepper I*), we held the district court erred by granting a 75% downward departure for substantial assistance and imposing a sentence of 24 months' imprisonment, because the district court erroneously based the extent of the departure on matters unrelated to Jason Pepper's (Pepper) assistance. On remand, the district court granted a 40% downward departure (five offense levels) for substantial assistance, followed by a 59% downward variance (eight offense levels), and again imposed a sentence of 24 months' imprisonment. The government appeals. We reverse.

Pepper II, 486 F.3d at 410; App. 27-28.

Judge Bennett was only reversed and remanded in *Pepper II* because the Court did not agree with the judge's 34 month downward variance, *Id.* 486 F.3d at 411, not because of the 5K1.1 issue again. The *Pepper II* Court stated:

> The lack of clarity regarding the extent to which the district court relied on any one factor notwithstanding, we conclude the district court abused its discretion in granting the downward variance. The district court failed to

> balance the other factors in § 3553(a), such as the need to impose a sentence reflecting the seriousness of Pepper's offense, which involved between 1,500 and 5,000 grams of methamphetamine mixture and ten to fifteen people, or how, in this case, a sentence of 24 months would promote respect for the law. The district court impermissibly considered Pepper's post-sentence rehabilitation, and further erred by considering Pepper's lack of violent history, which history had already been accounted for in the sentencing Guidelines calculation, and by considering sentencing disparity among Pepper's co-defendants without adequate foundation and explanation.
>
> For the reasons stated, we reverse and remand this case for resentencing consistent with this opinion. The district court expressed a reluctance to resentence Pepper again should this case be remanded. Thus, we remand Pepper's case for re-sentencing by a different judge, pursuant to our authority under 28 U.S.C. § 2106...

Id. at 413; App. 30.

The *Pepper II* Court affirmed Judge Bennett's ruling regarding his 5K1.1 downward departure. The Court recognized:

> The government argues the district court abused its discretion by granting a 40% downward departure given the pedestrian nature of Pepper's assistance. We review for abuse of discretion the extent of a reduction for substantial assistance.
>
> At the resentencing hearing, the government described Pepper's assistance, which included debriefing with law enforcement immediately after his arrest, a proffer interview, and testifying before the grand jury against two defendants. The government acknowledged Pepper was the main witness against one of the two defendants.

Id. at 411 (internal citation omitted); App. 28. The Court concluded:

> We believe reasonable proportionality exists here between Pepper's assistance and the downward departure. The district court properly identified only assistance-related factors and noted, although Pepper's assistance was "pedestrian or average," it was timely, truthful, honest, helpful, and important. The district court considered the § 5K1.1 factors, including the government's recommendation, but felt Pepper's assistance was worth more than the recommended 15% downward departure. The district court found, under Eighth Circuit precedent, Pepper's assistance merited "something less than a

> 50 percent reduction" and determined a 40% reduction was warranted. Although we believe it is a close call, we cannot say the district court abused its discretion by the extent of the § 5K1.1 departure.

Id.

As can be seen by the progression from *Pepper I* to *Pepper II*, the government raised the 5K1.1 and won (Judge Bennett had to only rely on substantial assistance factors), and then lost (Judge Bennett did not abuse his discretion by the extent of the § 5K1.1 departure). To allow it to litigate the exact same issue again at the second resentencing in front of a different judge gives them a third bite at the litigation apple. *See Santonelli*, 128 F.3d at 1239. It is highly unlikely that if Judge Bennett was the second resentencing judge he would have entertained any argument regarding the 5K1.1 departure being any less or more than what he had already determined and the Eighth Circuit affirmed.

There was only one issue identified as error in *Pepper III*. That was the appropriate variances under 18 U.S.C. § 3553(a) and *Gall*. The 5K1.1 issue was off the table, it had been litigated an unambiguously decided. The law of the case doctrine presumes a hearing on the merits. *United States v. Hatter*, 532 U.S. 557, 566 (2001).

In this case the government did not introduce substantially different evidence (Second Resentencing Tr. pp. 8-10) or shown that the *Pepper II* decision regarding substantial assistance was clearly erroneous and worked a manifest injustice. If the government was not happy with the *Pepper II* decision regarding the 40% departure, it could have challenged the reduction and filed a petition for rehearing or hearing en banc, or a petition for writ of certiorari with the United States Supreme Court. It did not.

There is no hint in either *Pepper II* or *Pepper III*, or excepiions taken by the government, to indicate Pepper is entitled to anything less than a 40% reduction for substantial assistance.

The prejudice to Pepper by Judge Reade failing to grant him the 40% reduction is apparent when looking at how it lengthened his term of imprisonment.

The undisputed Guideline range was 97 to 121 months. Judge Reade granted a 20% 5K1.1 reduction, so this moved Pepper's range to 77-97 months. She then awarded a post-sentencing Rule 35(b) departure of 15%. This moved his final sentence down to 65 months.

If Pepper was given the 40% 5K1.1 departure, as advocated by this argument, his time in the BOP, following credit for the time he already has served in the BOP along with good time credit and adjustments under 18 U.S.C. §§ 3621(e)(2)(B) & 3624(c)(1) and (2), could be one month.

His starting sentence would be 49 months, not 65 months. A 40% 5K1.1 reduction from the Guideline range of 97 to 121 months moves the range to 58 to 73 months. Then award the post-sentencing Rule 35(b) departure of 15%. This moves his final sentence down to 49 months.

In conclusion, there were no explicit or implicit instructions in *Pepper II* or *Pepper III* to hold further proceedings on remand regarding the 5K1.1 downward departure. The resentencing court erred by revisiting the issue to the prejudice of Pepper. The Supreme Court should grant this petition for writ of certiorari and remand the case back to the district court with directions to follow the law of the case.

II. FOLLOWING A SENTENCING REMAND, A DISTRICT COURT CAN CONSIDER A DEFENDANT'S EXEMPLARY POST-SENTENCING CONDUCT AS A PERMISSIBLE FACTOR SUPPORTING A SENTENCING VARIANCE UNDER 18 U.S.C. § 3553(a) AFTER *GALL v. UNITED STATES*.

Pepper exhibited exemplary and extraordinary conduct following his sentencing on March 10, 2004. He was released from the BOP, went to college, got a job, and was married.

Since the Eighth Circuit has ruled its district courts can't consider post-sentencing conduct under 18 U.S.C. § 3553(a), Pepper must go back to prison to serve the remaining balance of a 65 month sentence of imprisonment.

In light of the way federal sentencing has evolved through *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005) and *Gall v. United States*, – U.S.–, 128 S.Ct. 586, 169 L.Ed. 2d 445 (2007), Pepper's conduct following his sentencing warrants consideration for a variance under 18 U.S.C. § 3553(a). In relevant part this statute provides:

> (a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed--
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner...

18 U.S.C. § 3553(a)(1), (2).

In *Pepper IV* the Court ruled that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance and the district court followed this precedent. The Court ruled:

> We commend Pepper on the positive changes he has made in his life. However, the law of our circuit is clear. "[E]vidence of [a defendant]'s post-sentence rehabilitation is not relevant and will not be permitted at resentencing because the district court could not have considered that evidence at the time of the original sentencing." ..."This panel is bound by Eighth Circuit precedent, and cannot overrule an earlier decision by another panel." *United States v. Lovelace, 565 F.3d 1080, 1085 (8th Cir. 2009)* (quoting *Passmore v. Astrue, 533 F.3d 658, 660 (8th Cir. 2008)).*

Pepper IV, 570 F.3d at 965 (internal citations omitted); App. 5.

This finding does not seem quite fair since the Eighth Circuit allows the sentencing court to punish a defendant for his conduct while in jail waiting for sentencing. In *United States v. Jones*, 509 F.3d 911(8th Cir. 2007) the Court found that post-offense/pre-sentencing misconduct warrants a four-level upward variance because such misconduct demonstrates lack of acceptance of responsibility and is clearly relevant to § 3553(a) factors, such as protecting the public from future crimes, deterring criminal conduct and promoting respect for the law. *See id.*, at 913-14 (While in jail awaiting sentencing, Jones engaged in numerous incidents of disruptive behavior, including damaging a window, swinging a piece of broken glass and a telephone cord in a threatening manner, flooding his cell on numerous occasions, threatening to harm himself, throwing a cup of urine at a correction officer and speaking and acting disrespectfully toward the jail staff. The U.S.

Probation Office recommended that the district court consider imposing an upward variance based upon his misconduct in jail). Pepper's conduct once released from the BOP, while waiting for his case to go through the appellate process, is clearly relevant to § 3553(a) factors, such as protecting the public from future crimes, deterring criminal conduct and promoting respect for the law.

There appear to be hints in *Gall* that considering post-offense and post-sentencing rehabilitation in extraordinary circumstances is permissible at sentencing.

First, the Court in *Gall* reviewed what the Eighth Circuit regarded as the district judge's sentencing errors. One of the errors that the Eighth Cucuit found was that the district judge placed "too much emphasis on Gall's post-offense rehabilitation." *Id.*, 128 S.Ct. at 594. The Supreme Court found "we are not persuaded that these factors, whether viewed separately or in the aggregate, are sufficient to support the conclusion that the District Judge abused his discretion." *Id.*

Second, it appears *Gall* requires the district courts to focus on the circumstances of the post-offense rehabilitation and whether it was genuine, as opposed to precluding its consideration all together.

> The District Court quite reasonably attached great weight to the fact that Gall voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life. This lends strong support to the District Court's conclusion that Gall is not going to return to criminal behavior and is not a danger to society. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C). Compared to a case where the offender's rehabilitation occurred after he was charged with a crime, the District Court here had greater justification for believing Gall's turnaround was genuine, as distinct from a transparent attempt to build a mitigation case.

Gall, 128 S.Ct. at 600-01.

> The District Court quite reasonably attached great weight to Gall's self-motivated rehabilitation, which was undertaken not at the direction of, or under supervision by, any court, but on his own initiative. This also lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C).

Id., at 602.

Third, the Eighth Circuit's finding that it would be unfair to the vast majority of defendants who receive no sentencing court review of any positive post-sentencing rehabilitative efforts, *see Pepper IV*, 570 F.3d at 965; App. 5, does not seem consistent with *Gall's* findings that every sentencing is individually unique:

> "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."

Gall, 128 S.Ct. at 598 (quoting *Koon v. United States*, 518 U.S. 81, 113, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)).

In this case Pepper's life changes occurred before he realized his 24 month sentence of imprisonment and five years of supervised release would turn into a 65 month term of imprisonment and one year of supervised release. The Court should also take into consideration that the situation that Pepper faced (additional time in prison following all the appeals) was not created by him. He made the best of his situation and took advantage of the benefits provided by the BOP and supervised release. He went above and beyond minimal compliance.

Pepper, his father, and the probation officer have all provided information regarding Pepper's life on supervised release. Pepper had been employed, sober, was excelling in

college, and married. This information is extremely relevant in assessing at least three of the Section 3553(a) factors, deterrence, protection of the public and rehabilitation, 18 U.S.C. § 3553(a)(2)(B), (C) & (D). *See also Gall*, 128 S.Ct. at 600-01 (The District Court quite reasonably attached great weight to the fact that Gall voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life. This lends strong support to the District Court's conclusion that Gall is not going to return to criminal behavior and is not a danger to society.).

Pepper had not made a transparent attempt to build a mitigation case. He had been out of prison for nearly three and a half years under supervised release[2], had no problems, was attending school full-time, was motivated to enter a manager-in-training program, was currently employed, was named associate of the year last year at the Sam's Club, was married in May 2007, and had taken on the responsibilities of a child.

There is nothing more telling of Pepper's ability to be a productive, law-abiding member of society than his exemplary behavior after his release from prison. With this information, there is no need to speculate as to whether the sentence already imposed on Pepper was sufficient to promote his respect for the law or to provide adequate deterrence to future criminal conduct. *See* § 3553(a)(2)(A) & (B). This evidence proved the sentence

---

[2] Custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. *Gall*, 128 S.Ct. at 595. Offenders on probation are subject to several standard conditions that substantially restrict their liberty. *Id.* Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. *Id.* at 595-96. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. *Id.*, at 596. Most probationers are also subject to individual "special conditions" imposed by the court. *Id.*

already imposed, and still imposed due to supervised release, had protected the public from further crimes. *See* § 3553(a)(2)(C). Pepper successfully received substance abuse treatment. *See* § 3553(a)(2)(D). Additionally, it proved that Pepper is not going to return to criminal behavior and is not a danger to society. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C).

Pepper was not asking for a variance because he went to Yankton for 17 months and did a good job. He was requesting a variance because he was sentenced to prison and completed his substance abuse program, he then was released from prison to a halfway house, and then released to supervised release all under the terms of valid criminal justice sentence at the time. During this time when his future was in doubt and in the hands of our appellate system, he matured, was rehabilitated, excelled in school and employment, was married taking on the responsibility of a family, and had exhibited nothing but extraordinary behavior.

During resentencing on May 5, 2006, the government argued against the judge considering post-offense rehabilitation, but commended Pepper for being in school and employed, but stated that is what defendants are supposed to do. (Resentencing Tr. pp. 45-46, 66). Judge Bennett responded, "[b]ut very few do," to which the government responded, "[w]ell, that's true." *Id.* Judge Bennett's view is not alone. *See United States v. Hairston*, 502 F.3d 378, 384 (6th Cir. 2007) ("The whole point of the sentencing judge's opinion is that individuals who are able to extricate themselves from such a life of drugs and guns are a rarity. Sad as it may be, Hairston appears to have been unique among repeat drug offenders to have come before this district judge, in that he not only complied

with the terms of his post-arrest rehabilitation, but exceeded them. If the judge were not faced with "countless instances," in which defendants were back in his court having failed to comply with the terms of post-release rehabilitation, then Hairston's behavior would not have been extraordinary.").

As Judge Bennett recognized during the first resentencing, while Pepper should not get the benefit of the prior illegal sentence, he should not be penalized for doing extraordinarily well on supervised release. (Resentencing Tr. p. 90).

The Supreme Court should issue a ruling that Pepper's post-offense and post-sentencing rehabilitative efforts warrant consideration for a downward variance under 18 U.S.C. § 3553(a).

III. THERE IS A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS REGARDING POST-SENTENCING REHABILITATION AND WHETHER IT CAN SUPPORT A DOWNWARD SENTENCING VARIANCE UNDER 18 U.S.C. § 3553(a).

In the present case the Eighth Circuit ruled that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance. *Pepper IV*, 570 F.3d at 965, citing *Pepper III*, 518 F.3d at 953, which quoted *Pepper II, 486 F.3d at 413*; App. 5.

Two of its own circuit judges have questioned the Eighth Circuit precedent. These judges also recognized a conflict among the courts of appeals. Regarding post-sentencing rehabilitation, Circuit Judge Melloy wrote:

> My concern with this case, and the reason for my concurrence, is the binding precedent upon which the *McMannus* decision rests, that is, the inability to consider post-sentencing rehabilitation. I would join the Third Circuit and hold that post-sentencing rehabilitation is not normally relevant, however, there are exceptional cases in which it may be considered. *United States v. Lloyd*, 469 F.3d 319, 325 (3rd Cir. 2006); *see also, United States v. Butler*, 221 Fed.Appx. 616, 617 (9th Cir. 2007) (unpublished). I would also find that this

> is such an exceptional case and that if we could consider post-sentencing rehabilitation, the sentence in this case would be reasonable. The majority has outlined the post-sentencing rehabilitation testimony and characterizes the evidence the district court heard as ".. extensive and compelling ..." *ante* at 851. While I do not disagree with the concept that post-sentencing rehabilitation should not normally be considered because of the potential windfall to those defendants who are the beneficiaries of resentencings, I also do not believe that we should have a rule that never allows an experienced district judge to consider that evidence. Certainly, such evidence is valuable in a case such as this where the post-sentencing rehabilitation not only involves conduct while incarcerated, but exceptional performance while in a half-way house and then following release to the community. Both the state probation officer who supervised Mr. McMannus in the half-way house and the federal probation officer who is currently supervising him on supervised release testified to his exceptional conduct.
>
> In assessing at least three of the Section 3553(a) factors, deterrence, protection of the public and rehabilitation, 18 U.S.C. § 3553(a)(2)(B)(C) & (D), there would seem to be no better evidence than a defendant's post-incarceration conduct. In an exceptional case, such as this, I would permit the district court to consider that evidence in fashioning a reasonable sentence.

United States v. McMannus, 496 F.3d 846, 853 (8th Cir. 2007) (Melloy, C.J. and Smith, C.J., concurring).

The First, Third, and Fourth Circuits permit district courts to consider post-sentencing information in certain circumstances. *United States v. Sanchez*, 569 F.3d 995, 999 (9th Cir. 2009). *See United States v. Aitoro*, 446 F.3d 246, 255 n.10 (1st Cir. 2006) (We have noted that "if a remand for resentencing is otherwise justified, it is quite arguable that the sentence on remand can and should take account of intervening facts that normally bear on sentencing,"... but that in evaluating the need for Booker remand "our focus is primarily upon what was known at the time of sentencing." We are skeptical of the propriety of considering post-sentencing developments in the ordinary Booker-remand case, but here we are persuaded that Aitoro's case requires remand solely on the basis of

facts known at the time of sentencing and so need not decide whether and when it might be permissible to do so.); *United States v. Hughes*, 401 F.3d 540, 560 n.19 (4th Cir. 2005) (if new circumstances have arisen or events occurred since Hughes was sentenced that impact the range prescribed by the guidelines, the district court should adjust its calculation accordingly).

The Third Circuit in *United States v. Lloyd*, 469 F.3d 319 (3rd Cir. 2006) found that in an unusual case a district court could consider a defendant's post-sentencing rehabilitation efforts when resentencing. *Id.* at 325. The Court did ultimately find there were no post-sentencing circumstances that warranted a variance or departure for Mr. Lloyd. *Id.*

While it is an unpublished opinion, the Ninth Circuit in *United States v. Butler*, 221 Fed.Appx. 616, 2007 WL 582698 (9th Cir. 2007) (unpublished), found:

> Under the 1995 version of the Sentencing Guidelines applicable to Butler, the district court erred in concluding not to consider Butler's post-sentence rehabilitation as a basis for downward departure. Although in many instances such an error would be immaterial in a post-*Booker* world, we cannot conclude the error was harmless in this case. While indicating a general awareness it could sentence outside Guidelines after *Booker*, the district court did not take into consideration Butler's successful participation in various Bureau of Prisons programs, and that if consideration of those post-sentencing factors was appropriate, "this Court would find defendant should be given credit for that under the guideline structure and would be a basis for departure."

Id. 221 Fed.Appx. at 617-618, 2007 WL 582698.

Along with the Eighth Circuit Court of Appeals, the Sixth, Seventh, and Eleventh Circuits have all ruled post-sentencing rehabilitation is not an appropriate factor for judicial consideration under 18 U.S.C. § 3553(a). *See United States v. Worley*, 453 F.3d 706, 707, 709-10 (6th Cir. 2006) (defendant's post-sentencing conduct, which the district judge

declined to consider, is not a factor listed in § 3553(a), although arguably it could be considered a part of a defendant's "history and characteristics") and *United States v. Presley*, 547 F.3d 625, 631 n.1 (6th Cir. 2008) (In *Worley*, we upheld a district court's determination that post-sentencing rehabilitation was not a relevant factor in a Booker resentencing. We need not consider the effect of *Worley* on this case, however, because, although it mentioned Presley's post-sentencing rehabilitation, the district court made clear that the primary factor upon which Presley's sentence was based was the disparity between Presley's and Davis's sentences.); *United States v. Re*, 419 F.3d 582, 584 (7th Cir. 2005) (the conduct or circumstances that bear on the § 3553(a) factors must have been in existence at the time the original sentence was imposed and post sentencing events or conduct simply are not relevant to that inquiry); and, *United States v. Lorenzo*, 471 F.3d 1219, 1221 (11th Cir. 2006) (Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when re-sentencing the defendant for that offense.).

The Supreme Court should grant this petition for writ of certiorari to resolve the conflict among the United States Courts of Appeal as to whether post-sentencing rehabilitative efforts can be considered under § 3553(a).

IV. SINCE THE FEDERAL COURTS ARE GRANTING VARIANCES FOR POST-OFFENSE REHABILITATION UNDER 18 U.S.C. § 3553(a), THEY SHOULD BE PERMITTED TO GRANT VARIANCES FOR POST-SENTENCING REHABILITION.

A variance for post-offense conduct is permitted by *Gall* and the federal courts. *Gall* requires the district courts to focus on the circumstances of the post-offense

rehabilitation and whether it was genuine, as opposed to precluding its consideration all together:

> The District Court quite reasonably attached great weight to the fact that Gall voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life. This lends strong support to the District Court's conclusion that Gall is not going to return to criminal behavior and is not a danger to society. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C). Compared to a case where the offender's rehabilitation occurred after he was charged with a crime, the District Court here had greater justification for believing Gall's turnaround was genuine, as distinct from a transparent attempt to build a mitigation case.

Gall, 128 S.Ct. at 600-01.

> The District Court quite reasonably attached great weight to Gall's self-motivated rehabilitation, which was undertaken not at the direction of, or under supervision by, any court, but on his own initiative. This also lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C).

Id., at 602.

The Eighth Circuit in *United States v. Shy*, 538 F.3d 933 (8th Cir. 2008) found the district court's variance to probation based on the defendant's conduct and rehabilitation after her arrest was reasonable and was not an abuse of discretion. *Id.*, at 936-38. The Court found that the district court properly considered the defendant's rehabilitation after her initial arrest and before her indictment. *Id.*, at 938. Even though the defendant's rehabilitation only came after an encounter with law enforcement, her rehabilitation appeared genuine and she was a positive contributor to society through her extraordinary work with persons with disabilities. *Id.*

The Sixth Circuit in *Hairston*, found that the district court did not abuse its discretion when it made a downward variance to 60 months from 121 months for post-offense

rehabilitation. *Id.*, 502 F.3d at 385. The district court considered the history and characteristics of the defendant, his employment and work effort, he had supported his children, and that he complied wholeheartedly with all of his post-offense arrest conditions. *Id.*, at 383.

The Eleventh Circuit in *United States v. Clay*, 483 F.3d 739 (11th Cir. 2007) found that the district court did not abuse its discretion when it made a downward variance to 60 months from 188 months for post-offense rehabilitation. *Id.*, at 742-43, 745-46.

The Court found:

> It is true that some of Clay's postoffense behavior was not extraordinary. Among the conditions of Clay's pretrial release were maintaining or actively seeking employment, refraining from use or possession of controlled substances, and participating in substance abuse treatment. If Clay had not attended a drug program, stayed clean, and found a job, his bail could have been revoked.
>
> But Clay went beyond minimal compliance with his bail conditions. Clay's former employer testified that Clay worked a second job for him on the weekends, and stated that he would hire him again "tomorrow" if he could. The Lenos testified that, beyond merely attending drug counseling meetings, Clay invited fellow addicts into his home and inspired them to overcome their addictions through his example. On his own initiative, Clay also visited a juvenile detention center regularly for over a year and encouraged young people to change their lives. The confidence of people who did not know Clay before his arrest-people who had nothing to gain by lying about his transformation and plenty to lose if his transformation was phony-helps to demonstrate the extraordinariness of Clay's rehabilitation.
>
> Clay's family, his lawyer, and witnesses who worked in corrections emphasized that Clay's experience was not a "jailhouse conversion." Six months elapsed between Clay's arrest for misdemeanor possession and his indictment on federal charges. That the changes in Clay's life occurred before Clay had any inkling that he would face a prison sentence further evidences that the measure of his rehabilitation was extraordinary.

Id., at 746.

The very same efforts that make post-offense rehabilitation a permissible variance (law-bidding life, work, treatment, family, contributor to society) are present in a post-sentencing defendant's case such as Pepper's. In this case, Pepper's post-sentencing rehabilitative efforts are the very same efforts that the courts are using to grant variances for post-offense rehabilitative efforts.

The Eighth Circuit states to allow a defendant's post-sentencing rehabilitation successes to influence his sentence would be grossly unfair to the vast majority of defendants who receive no sentencing-court review of any positive post-sentencing rehabilitative efforts. *Pepper IV*, 570 F.3d at 965; App. 5. But, the same can be said of the vast majority of defendants who receive no sentencing-court review of any positive post-offense rehabilitative efforts because they are detained pre-trial under 18 U.S.C. § 3142(e). Defendant's detained pending trial are not as fortunate as the defendant's in *Gall*, *Shy*, *Hairston*, and *Clay*, who were released pending trial and were able to make positive changes in their lives.

The Supreme Court should grant this petition for writ of certiorari in order to permit the federal courts to consider post-sentencing rehabilitative efforts under § 3553(a).

CONCLUSION

Pepper respectfully requests that the Supreme Court grant his petition for a writ of certiorari for all the reasons stated herein.

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JOINT APPENDIX

No. 09-6822

Supreme Court, U.S.
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In The
Supreme Court of the United States

JASON PEPPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Northern District of Iowa (Western Division)
CRIMINAL DOCKET FOR CASE #:
5:03-cr-04113-LRR-4

Case title: USA v. Barragan-Torres et al
Other court case number: 03mj121 NDIA

Date Filed	#	Docket Text
10/22/2003	1	SEALED INDICTMENT as to Defendant(s) Jose Martin Barragan-Torres (1) count(s) 1, Alexander Blankenship (2) count(s) 1, Felipe Sandoval (3) count(s) 1, Jason Pepper (4) count(s) 1 [Voting record in vault]. (des,) Additional attachment(s) added on 6/2/2006 – redacted indictment attached (src). (Entered: 10/23/2003)
12/18/2003	30	Minute Entry for proceedings held before Judge Paul A Zoss :Change of Plea Hearing as to Defendant Jason Pepper held on 12/18/2003 (Court Reporter Carolyn Plueger, Schuetts Reporting.) (ak,) (Entered: 12/18/2003)
01/09/2004	42	ORDER ACCEPTING REPORT AND RECOMMENDATION re PLEA as to Defendant Jason Pepper for 33 Report and Recommendation to Accept Guilty Plea to count 1 of the indictment. Signed by Judge Mark W Bennett on 1/09/04. (des,) (Entered: 01/09/2004)

03/18/2004	71	JUDGMENT as to Defendant Jason Pepper (4) – Count 1 – Defendant committed to BOP for 24 months – Defendant on supervised release for 60 months – $100 special assessment – Judgment Book #59 – Document #7. Signed by Chief Judge Mark W Bennett on 03/17/04. (kfs,) (Entered: 03/18/2004)
04/19/2004	76	NOTICE OF APPEAL by USA as to Defendant Jason Pepper re 71 Judgment, (Lammers, John) (Entered: 04/19/2004)
04/21/2004	77	Judgment Returned Executed as to Defendant Jason Pepper delivered on 4/12/2004 to FPC in Yankton, SD. (src) (Entered: 04/21/2004)
07/21/2005	122	ORDER/OPINION of USCA (certified copy) as to Defendant Jason Pepper re 76 Notice of Appeal – Final Judgment: remand this case for resentencing. (des,) (Entered: 07/21/2005)
07/21/2005	123	JUDGMENT of USCA (certified copy) as to Jason Pepper re 76 Notice of Appeal – Final Judgment: remanded for resentencing. (Attachments: #1 Receipt for Mandate) (des,) (Entered: 07/21/2005)
02/24/2006	127	MOTION for Downward Deviation from Advisory Guidelines by Defendant Jason Pepper. (Attachments: # 1 Brief) (Parry, Patrick) (Entered: 02/24/2006)

03/13/2006	129	RESPONSE by USA as to Defendant Jason Pepper re 127 Motion for Miscellaneous Relief filed by Jason Pepper, (Lammers, John) (Entered: 03/13/2006)
05/02/2006	131	SUPPLEMENT to 127 Motion for Downward Deviation from Advisory Guidelines by Defendant Jason Pepper (Attachments: #1 Witness List #2 Exhibit List #3 Exhibit 1 #4 Exhibit 2) (Parry, Patrick) Modified to seal Witness List and Exhibit 2 as they contain personal identifiers on 5/3/2006 (ksy,). (Entered: 05/02/2006)
05/10/2006	133	AMENDED JUDGMENT as to Defendant Jason Pepper (4), Count 1. Defendant committed to BOP for 24 months (time served) on Count 1 of the Indictment – Supervised Release for 60 months – Special Assessment fee of $100.00. (certified copies to AUSA, USP, USM and Financial) Signed by Judge Mark W Bennett on 5/10/06. (src) (Entered: 05/10/2006)
06/05/2006	136	NOTICE OF APPEAL by USA as to Defendant Jason Pepper re 133 Amended/Revocation Judgment. (Lammers, John) Modified on 6/6/2006 to take out dollar amount (src). (Entered: 06/05/2006)

05/21/2007 147 ORDER – In its 5/21/07 opinion, the United States Court of Appeals remanded the above-entitled matter to the USDC for the Northern District of Iowa for resentencing by another district court judge. It is therefore ordered this matter is reassigned from Judge Mark W. Bennett to Chief Judge Linda R. Reade for resentencing as to Defendant Jason Pepper. Signed by Chief Judge Linda R Reade on 5/21/07. (de) Modified text on 5/22/2007 (ksy,). (Entered: 05/21/2007)

05/22/2007 149 OPINION of USCA (certified copy) as to Defendant Jason Pepper re 136 Notice of Appeal – Final Judgment. This case is remanded for resentencing consistent with this opinion. The Chief Judge of the district court shall reassign this case, in the ordinary course, for resentencing by another Judge. (src) (Entered: 05/22/2007)

05/22/2007 150 VACATED – SEE ORDER AT DOCKET NO. 175 – JUDGMENT of USCA (certified copy) as to Jason Pepper re 136 Notice of Appeal – Final Judgment. The judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this

court. (src) Modified on 2/25/2008 to add text. (src) (Entered: 05/22/2007)

06/11/2007 151 RECALLED – SEE ORDER AT DOCKET NO. 175 – MANDATE of USCA (certified copy) as to Jason Pepper re 136 Notice of Appeal – Final Judgment. In accordance with 149 Opinion and 150 Judgment of 5/21/07, the formal mandate is hereby issued in the above-styled matter. (src) Modified to link on 6/12/2007 (ksy,). Modified on 2/25/2008 to add text. (src) (Entered: 06/11/2007)

06/27/2007 152 ORDER SETTING HEARING as to Defendant Jason Pepper: Second resentencing set for 7/27/2007 10:00 AM in SC 1st Fl Ct before Chief Judge Linda R Reade. Signed by Chief Judge Linda R Reade on 6/27/07. (ksy,) (Entered: 06/27/2007)

07/12/2007 154 NOTICE *Regarding Sentencing Issues* by USA as to Defendant Jason Pepper (Lammers, John) (Entered: 07/12/2007)

07/12/2007 155 RESENTENCING MEMORANDUM by USA as to Defendant Jason Pepper (Lammers, John) Modified on 7/18/2007 (ksy,). (Entered: 07/12/2007)

07/12/2007 157 RESENTENCING BRIEF by Defendant Jason Pepper *re: Second Resentencing* (Parry, Patrick) Modified text on 7/13/2007. (mj) Modified on 7/18/2007 (ksy,). (Entered: 07/12/2007)

07/13/2007 158 ORDER, Re 152 Order – Neither party complied with the court's order to address the scope of the remand from Pepper II. Therefore, the court orders the parties to submit supplemental sentencing memoranda on the issue of the scope of the remand from Pepper II **on or before 7/17/2007**. If a party does not file its supplemental sentencing memorandum in a timely manner or if a brief citing to legal authority is not filed, the court shall consider the issues previously raised by the party to be waived, as to Defendant Jason Pepper. Check Status Deadline due by 7/17/2007. Signed by Chief Judge Linda R Reade on 7/13/07. (de) (Entered: 7/13/2007)

07/17/2007 159 SUPPLEMENTAL SECOND RESENTENCING BRIEF to 157 Second Resentencing Brief by Defendant Jason Pepper *re: Second Resentencing Scope of Remand* (Parry, Patrick) Modified text and link on 7/18/2007 (ksy,). (Entered: 07/17/2007)

07/17/2007 160 SUPPLEMENTAL RESENTENCING MEMORANDUM to 155 Resentencing Memorandum by USA as to Defendant Jason Pepper (Lammers, John) Modified text and link on 7/18/2007 (ksy,). (Entered: 07/17/2007)

07/18/2007 161 ORDER as to Defendant Jason Pepper. At the second resentencing hearing, the court shall sentence Defendant in a manner consistent with the instant order. The court will not consider itself bound to reduce Defendant's advisory Sentencing Guidelines range by 40%, and the court will not consider any additional assistance that Defendant may have provided after his first resentencing hearing. Signed by Chief Judge Linda R Reade on 7/18/07. (mj) (Entered: 07/18/2007)

08/28/2007 171 ORDER CANCELLING HEARING as to Defendant Jason Pepper. The attorneys for Deft Jason Pepper have notified the court that they have filed a Petition for Writ of Certiorari in the US Supreme Court. Pursuant to the agreement of the parties at the last status conference, the 2nd resentencing hearing, which is presently set for 9/4/2007, is cancelled. The court shall reset the 2nd resentencing hearing after final disposition of the Petition. Attorneys for Defendant to notify the court immediately upon their receipt of information from the Supreme Court as to whether it will grant or deny the Petition. Signed by Chief Judge Linda R Reade on 8/28/2007. (de) (Entered: 08/28/2007)

01/15/2008 173 WRIT OF CERTIORARI Issued by US Supreme Court as to Defendant Jason Pepper re 136 Notice of Appeal – Final Judgment: Supreme Court No. 07-6046: The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit, for further consideration. (Attachments: #1 8th Circuit Memo, #2 Correction letter re: 8th Circuit Memo) (ksy) Modified on 1/17/2008 (ksy). (Entered: 01/16/2008)

02/25/2008 175 ORDER of USCA (certified copy) as to Defendant Jason Pepper re 136 Notice of Appeal – Final Judgment. Pursuant to the judgment of the United States Supreme Court 173 dated 1/7/08, this court's judgment 150 dated May 21, 2007, is vacated. The mandate 151 is hereby recalled, and the case is reopened. (src) (Entered: 02/25/2008)

03/11/2008 177 OPINION of USCA (certified copy) as to Defendant Jason Pepper re 136 Notice of Appeal – Final Judgment. Pepper's case is again reversed and remanded for resentencing consistent with this opinion. This case is remanded for resentencing by a different judge. (src) (Entered: 03/11/2008)

03/11/2008 178 JUDGMENT of USCA (certified copy) as to Jason Pepper re 136 Notice of Appeal – Final Judgment.

The judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court. (src) (Entered: 03/11/2008)

04/02/2008 179 MANDATE of USCA (certified copy) as to Jason Pepper re 136 Notice of Appeal – Final Judgment. In accordance with the opinion 177 and judgment 178 of March 11, 2008, the formal mandate is hereby issued. (src) (Entered: 04/02/2008)

05/02/2008 182 ORDER cancelling status hearing set for 4/10/2008 at 10:30 a.m. and the resentencing set for 5/2/2008 as to Defendant Jason Pepper. If Deft decides not to seek a Writ of Certiorari, he shall notify the court. Defense counsel shall advise the Court promptly if the Writ is denied. Signed by Chief Judge Linda R Reade on 5/2/2008. (de) (Entered: 05/02/2008

06/16/2008 183 Appeal Remark as to Defendant Jason Pepper re 136 Notice of Appeal – Final Judgment. The Petition for a writ of certiorari was filed on June 9, 2008 and placed on the docket June 10, 2008 as No. 07-11316. (Attachments: # 1 Correspondence from Eighth Circuit Court of Appeals) (src) (Entered: 06/16/2008)

10/13/2008 187 MOTION to File Overlength Brief by Jason Pepper. (Attachments: #1 Brief Second Resentencing Memorandum) (Parrish, Alfredo) (Entered: 10/13/2008)

10/14/2008 188 EXHIBIT LIST by Defendant Jason Pepper (Spies, Leon) (Entered: 10/14/2008)

10/14/2008 191 WRIT OF CERTIORARI Denied by US Supreme Court as to Defendant Jason Pepper re 136 Notice of Appeal – Final Judgment. Supreme Court No. 07-11316. (Attachments: #1 Courtesy Notice Page 2) (ksy) (Entered: 10/14/2008)

10/14/2008 192 MOTION Request for Variance Below Guideline Range by Jason Pepper. (Parrish, Alfredo) (Entered: 10/14/2008)

10/14/2008 193 SENTENCING MEMORANDUM by USA as to Defendant Jason Pepper (Lammers, John) (Entered: 10/14/2008)

10/20/2008 195 Minute Entry for proceedings held before Chief Judge Linda R Reade: Sentencing held on 10/17/2008 as to defendant Jason Pepper. Defendant's motion for downward variance 192 – no ruling. Hearing continued, hearing will be scheduled in Cedar Rapids to announce sentence. Exhibits housed in clerk's file. Defendant not detained. (Court Reporter – Shelly Semmler) (src) (Entered: 10/20/2008)

01/05/2009 201 Minute Entry for proceedings held before Chief Judge Linda R Reade: Sentencing held on 1/5/2009 as to defendant Jason Pepper. Defendant released pending self-surrender. Government's sealed motion (docket no. 200) granted, no order to follow. (Court Reporter Patrice Murray) (pac) Modified text on 1/6/2009 (ksy). (Entered: 01/05/2009)

01/06/2009 202 AMENDED JUDGMENT as to Defendant Jason Pepper (4), Count(s) 1. Defendant committed to BOP for 77 months on Count 1 of the indictment. Supervised Release for 12 months. Special Assessment $100 (paid). Signed by Chief Judge Linda R Reade on 01/05/09. Defendant shall surrender for service of sentence as notified by USM. (lbb) (Entered: 01/06/2009)

01/06/2009 203 AMENDED JUDGMENT as to Defendant Jason Pepper (4), Count(s) 1. AMENDED JUDGMENT 01/05/09: Defendant committed to BOP for 65 months on Count 1 of the indictment. Supervised Release for 12 months. Special Assessment $100 (paid). The defendant shall surrender for service of sentence as notified by USM. Signed by Chief Judge Linda R Reade on 01/05/09. (lbb) (Entered: 01/06/2009)

01/16/2009 207 NOTICE OF APPEAL by Defendant Jason Pepper re 203 Amended/ Revocation Judgment, (Spies, Leon) (Entered: 01/16/2009)

04/20/2009 226 Judgment Returned Executed as to Defendant Jason Pepper delivered on 4/2/09 to FPC Florence. (ksy) (Entered: 04/20/2009)

07/02/2009 227 OPINION of USCA (certified copy) as to Defendant Jason Pepper re 207 Notice of Appeal – Final Judgment. Affirmed (Attachments: #1 Correspondence, #2 Correspondence) (ksy) (Entered: 07/02/2009)

07/02/2009 228 JUDGMENT of USCA (certified copy) as to Jason Pepper re 207 Notice of Appeal – Final Judgment: It is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court. (ksy) (Entered: 07/02/2009)

07/27/2009 229 MANDATE of USCA (certified copy) as to Jason Pepper re 207 Notice of Appeal – Final Judgment. In accordance with the opinion 227 and judgment 228 of 07/02/09, the formal mandate is hereby issued in this matter. (src) (Entered: 07/27/2009)

10/29/2009 231 Petition for a writ of certiorari was filed by Defendant Jason Pepper with the US Supreme Court on 09/29/09, and placed on the docket 10/02/09 as No. 09-6822. (Attachments: #1 Correspondence from Supreme Court) (src) (Entered: 10/29/2009)

06/29/2010 232 MOTION Release *pending Writ* by Jason Pepper. (Attachments: #_1 Brief in support of, #_2 Exhibit) (Parrish, Alfredo) (Entered: 06/29/2010)

07/01/2010 234 RESPONSE to Motion by USA as to Defendant Jason Pepper re 232 MOTION Release *pending Writ* (Lammers, John) (Entered: 07/01/2010)

07/12/2010 235 RESPONSE to Motion by Defendant Jason Pepper re 232 MOTION Release *pending Writ Reply to Governments Response* (Parrish, Alfredo) (Entered: 07/12/2010)

07/20/2010 236 SUPPLEMENT to 232 Response to Motion filed by Jason Pepper by Defendant Jason Pepper (Parrish, Alfredo) Modified text on 7/21/2010 (ksy). Modified link on 7/21/2010 (ksy). (Entered: 07/20/2010)

07/22/2010 237 ORDER granting 232 Motion for Release Pending Disposition of Petition for Writ of Certiorari as to Jason Pepper (4). Defendant shall be

released from the custody of the BOP effective 7/23/2010 at 5:00 pm to his family. Deft shall be subject to the same terms and conditions of supervision that he was subject to on pretrial release. Within 72 hours of his release, Deft shall report to the USPO for the Central District of Illinois. Signed by Chief Judge Linda R Reade on 7/22/2010. (certified copies to USM) (de) Modified on 7/22/2010 – mld to R. Sikma (de). (Entered: 07/22/2010)

07/22/2010 238 Minute Entry for proceedings held before Chief Judge Linda R Reade: Motion Hearing as to Defendant Jason Pepper held on 7/22/2010 granting re 232 MOTION for Release *pending Writ* of Certiorari filed by Jason Pepper. (Court Reporter Patrice Murray.) (de) (Entered: 07/22/2010)

07/29/2010 239 WRIT OF CERTIORARI and leave to proceed in forma pauperis granted by US Supreme Court as to Defendant Jason Pepper re 207 Notice of Appeal – Amended Judgment. (Attachments: # 1 Cover Letter) (des) (Entered: 07/29/2010)

08/03/2010 241 AMENDED AND SUBSTITUTED ORDER as to Defendant Jason Pepper re 237 Order on Motion for

Release Pending Disposition of Petition for Writ of Certiorari 232 is granted. Deft shall be released from the custody of the Bureau of Prisons effective 7/23/2010 at 5:00 p.m. to his family. Signed by Chief Judge Linda R Reade on 8/3/2010. (certified copies to USM) (de) (Entered: 08/03/2010)

(Pepper I)

General Docket
Eighth Circuit Court of Appeals

Court of Appeals Docket #: 04-2057

USA v. Jason Pepper

06/24/2005	JUDGMENT: Morris S. Arnold, C. A. Beam, William J. Riley. :REMANDED for resentencing in accordance with the opinion. [04-2057] [1920067] (PAW)
07/19/2005	MANDATE ISSUED [04-2057] (PAW)

(Pepper II and III)

General Docket
Eighth Circuit Court of Appeals

Court of Appeals Docket #: 06-2453

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

JASON PEPPER

Defendant-Appellee

06/07/2006	REMARKS: GOVT APPEAL – 21:844 Consp. to dist. 500 grams or more of Methamphetamine mixture – Correction of sentence – 24 mos.(time served), Def has been released – [06-2453] (JMH)
05/21/2007	OPINION FILED – THE COURT: WILLIAM JAY RILEY; PASCO M. BOWMAN; MORRIS S. ARNOLD. William Jay Riley, Authoring Judge (PUBLISHED) [3311227] [06-2453] (PAW)
05/21/2007	JUDGMENT FILED – The judgment of the originating court is REVERSED and REMANDED in accordance with the opinion. WILLIAM JAY RILEY; PASCO M. BOWMAN; MORRIS S. ARNOLD Hrg Oct 2006 [3311231] [06-2453] (PAW)
06/11/2007	MANDATE ISSUED. [06-2453] (PAW)
08/28/2007	U.S. Supreme Court Notice of cert filed. Supreme Court Case Number: 07-6046, Filed Date: 08/22/2007 [3346097] [06-2453] (PAW)

01/12/2008 Supreme Court Judgment Filed: Vacated and Remanded. Judgment Date: 01/07/2008. (See Judgment for complete text) [3403794] [06-2453] (PAW)

01/15/2008 SUPREME COURT order filed granting cert petition. Order filed on 01/07/2008. [3392181] [06-2453] (PAW)

02/15/2008 CLERK ORDER: Pursuant to the judgment of the U.S. Supreme Court dated 1/7/08, this court's judgment dated 5/21/07, is vacated. The mandate is hereby recalled, and the case is reopened. [3403797] [06-2453] (PAW)

02/15/2008 CASE REOPENED 1 [06-2453] (PAW)

03/11/2008 OPINION FILED – THE COURT: WILLIAM JAY RILEY, PASCO M. BOWMAN and MORRIS S. ARNOLD. William Jay Riley, Authoring Judge (PUBLISHED) [3411456] [06-2453] (PAW)

03/11/2008 JUDGMENT FILED – The judgment of the originating court is REVERSED and REMANDED in accordance with the opinion. WILLIAM JAY RILEY, PASCO M. BOWMAN and MORRIS S. ARNOLD Hrg Oct 2006 [3411460] [06-2453] (PAW)

04/01/2008 MANDATE ISSUED. [3419284] [06-2453] (PAW)

06/13/2008 U.S. Supreme Court Notice of cert filed. Supreme Court Case Number: 07-11316,

	Filed Date: 06/10/2008 [3443276] [06-2453] (PAW)
10/14/2008	SUPREME COURT order filed denying cert petition. Order filed on 10/06/2008. [3480037] [06-2453] (PAW)

(Pepper IV)

General Docket
Eighth Circuit Court of Appeals

Court of Appeals Docket #: 09-1191

United States v. Jason Pepper

07/02/2009	OPINION FILED – THE COURT: WILLIAM JAY RILEY, LAVENSKI R. SMITH and STEVEN M. COLLOTON. William Jay Riley, Authoring Judge (PUBLISHED) [3562913] [09-1191] (DMH)
07/02/2009	JUDGMENT FILED – The judgment of the Originating Court is AFFIRMED in accordance with the opinion. WILLIAM JAY RILEY, LAVENSKI R. SMITH and STEVEN M. COLLOTON Hrg May 2009 [3562917] [09-1191] (DMH)
07/27/2009	MANDATE ISSUED. [3569922] [09-1191] (SRD)
10/05/2009	U.S. Supreme Court Notice of cert filed in the Supreme Court on 09/29/2009, case No. 09-6822 [3600139] [09-1191] (SRD)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. CR 03-4113MWB
vs.	)	**COUNT 1**
JOSE MARTIN BARRAGAN-TORRES, ALEXANDER BLANKENSHIP, FELIPE SANDOVAL, AND JASON PEPPER,	)	21 U.S.C. § 841(a)(1) 21 U.S.C. § 841(b)(1)(A) 21 U.S.C. § 846
Defendants.	)	

INDICTMENT

(Filed Oct. 22, 2003)

The Grand Jury charges:

COUNT 1

Between about January 1, 2003 and continuing through October 1, 2003 in the Northern District of Iowa, the defendants, JOSE MARTIN BARRAGAN-TORRES, ALEXANDER BLANKENSHIP, FELIPE SANDOVAL, AND JASON PEPPER, did knowingly and unlawfully combine, conspire, confederate, and agree with each other and with other persons, known and unknown to the Grand Jury, to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a

Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A).

This was in violation of Title 21, United States Code, Section 846.

A TRUE BILL

/s/ [Illegible]
Foreperson
Dated: October ~~20~~ 21 [by DL], 2003

CHARLES W. LARSON, SR.
United States Attorney

By: /s/ John H. Lammers
JOHN H. LAMMERS
Special Assistant
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	NO. CR 03-4113MWB
Plaintiff,	)	Sioux City, Iowa
VS.	)	Date Taken: December 18, 2003
JASON PEPPER,	)	Date Ordered:
Defendant.	)	August 2, 2010

TRANSCRIPT OF CHANGE OF PLEA HEARING
BEFORE THE HONORABLE PAUL A. ZOSS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	Jack Lammers Assistant US Attorney 600 4th Street Suite 670 Sioux City, Iowa 51101
For the Defendant:	William Binkard Attorney at Law
Transcript Ordered by:	Alfredo Parrish 2910 Grand Avenue Des Moines, Iowa 50312
Court Reporter:	Carolyn Plueger, CSR, RPR P.O. Box 1325 Sioux City, Iowa 51102-1325

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[4] about pleading guilty at any time during this hearing by simply telling me you don't want to plead guilty.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: I now have to ask you some personal questions to make sure you don't have any mental or physical problems that would make it hard for you to understand what we're going to be talking about during this plea hearing.

First of all, would you state your full name?

THE DEFENDANT: Jason Alan Pepper.

THE COURT: And how old are you?

THE DEFENDANT: Twenty-four.

THE COURT: How far did you go in school?

THE DEFENDANT: I graduated high school.

THE COURT: Where did you go to high school?

THE DEFENDANT: St. Joseph-Ogden.

THE COURT: Is it true, then, that you read, write and speak and understand the English language?

THE DEFENDANT: Yes, sir.

THE COURT: If you have any problems understanding anything that comes up during this hearing, will you let me know so I can better explain it to you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you ever suffered from or had any problems with alcohol or drug abuse?

[5] THE DEFENDANT: Yes, sir.

THE COURT: What is the nature of those problems?

THE DEFENDANT: I was addicted to methamphetamine as well as alcohol.

THE COURT: Is there anything about your history of methamphetamine or alcohol abuse that is making it hard for you to understand what's happening at this hearing today?

THE DEFENDANT: No, sir.

THE COURT: Have you ever suffered from depression, anxiety, or any other mental illness?

THE DEFENDANT: Yes, sir.

THE COURT: And tell me the history of that.

THE DEFENDANT: I – I had depression from my brother passing away as well as my mother passing away in the past.

THE COURT: Were you treated for that depression?

THE DEFENDANT: Yes.

THE COURT: Are you currently still being treated for that depression?

THE DEFENDANT: No.

THE COURT: Is there anything about your history of depression or the treatment that you had for depression that interferes here today with your ability to understand what's happening?

* * *

[Reporter's Certificate Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

JASON PEPPER,

Defendant.
/

No. CR03-4113

TRANSCRIPT OF
SENTENCING

The Sentencing held before the Honorable Mark W. Bennett, Chief Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, March 10, 2004, commencing at 1:29 p.m.

APPEARANCES

For the Plaintiff:	JOHN H. LAMMERS, ESQ. Assistant United States Attorney 203 Federal Building 320 Sixth Street Sioux City, IA 51101
For the Defendant:	WILLIAM L. BINKARD, ESQ. 601 West 29th Street South Sioux City, NE 68776
Also present:	Chad Zach, U.S. Probation
Reported by:	Shelly Semmler, RMR, CRR 320 Sixth Street Sioux City, IA 51101 (712) 233-3846

[2] THE COURT: Good afternoon, Please be seated. This is United States versus Jason Pepper, Criminal Number 2003-4113. The defendant is personally present represented by Bill Binkard. United States is represented by Assistant U.S. Attorney Jack Lammers, and we're here to sentence the defendant.

Mr. Lammers, has the government had an adequate opportunity to review the presentence report?

MR. LAMMERS: I have, Your Honor.

THE COURT: My understanding is the government has no objections to the presentence report; is that correct?

MR. LAMMERS: That's correct, Your Honor.

THE COURT: And do you agree that the total offense level is 30, criminal history category 1, and because the defendant is safety valve eligible United States Sentencing Guideline range of 97 to 121 months?

MR. LAMMERS: Yes, Your Honor.

THE COURT: And is the government making a substantial assistance motion?

MR. LAMMERS: Yes, Your Honor.

THE COURT: And because the defendant's safety valve eligible, am I correct that you need only make the substantial assistance motion under United States Sentencing Guideline 5K1.1 and you don't

have to make the second motion under Title 18, section 3553(e)?

[3] MR. LAMMERS: Yes, Your Honor.

THE COURT: Okay. We'll be back to you in a minute on the substantial assistance motion.

Mr. Binkard, how are you today?

MR. BINKARD: Quite well, thank you.

THE COURT: Good. Good to see you again. Have you had a full, fair, and complete opportunity to review the presentence report?

MR. BINKARD: I have.

THE COURT: And my understanding is that there aren't really any objections to it, but why don't you explain these motions that were filed. I'm a little bit perplexed why the one was filed under seal, why you wanted me to seal it.

MR. BINKARD: Oh. Well, I talked with Julie Hoch, and I was going to do it over the Internet, and she was leading me through because it was the first electronic one I had done. And she said, oh, that pertains to presentence report and that's under seal, so you better put the motion under seal.

THE COURT: I see. Okay.

MR. BINKARD: Now, I didn't put whether the government concurred or resisted because I

couldn't get a hold of the U.S. attorney, but I've spoken to him today, and he concurs with it.

[4] THE COURT: And this really – does this prior conviction affect whether or not the defendant would be safety valve eligible?

MR. BINKARD: No, and it's not a conviction. It was just an outstanding warrant.

THE COURT: I see. I gotcha.

MR. BINKARD: And the prosecutor in Illinois agreed he'd just dump that and recall the warrant.

THE COURT: So it might depend on where the defendant might ultimately go.

MR. BINKARD: Exactly.

THE COURT: Yeah, if they pursued it and lodged a detainer. Am I tracking you?

MR. BINKARD: Yeah.

THE COURT: Gotcha. Okay. And you don't have any problem with it.

MR. LAMMERS: No.

THE COURT: Okay. Good. Am I right you don't have any objections for me to rule on?

MR. BINKARD: That's right.

THE COURT: And you agree with the guideline calculations, 97 to 121 months?

MR. BINKARD: I do. Your Honor, we would ask that the Court have the presentence modified to delete that warrant being outstanding.

[5] THE COURT: Yes, yes. And to the extent that you've moved me to do that in your written motion under seal, I'll grant that motion and instruct the probation office to do that in the PSIR.

MR. BINKARD: Thank you.

THE COURT: Now, Mr. Pepper, have you had an adequate opportunity to read your presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: And have you had an opportunity to go over it and ask Mr. Binkard any questions that you might have about your presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And do you understand that as it stands right now your total offense level is 30, you're what we call a criminal history category 1, and your United States Sentencing Guideline range is 97 to 121 months? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, the government's indicated that they're going to be making a substantial assistance motion on your behalf, and in this case if

I grant that motion, that would allow me to go below the 97-month mandatory minimum sentence. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that I don't have to [6] grant the motion?

THE DEFENDANT: Yes, sir.

THE COURT: That I have basically total discretion whether to grant the motion or not, and actually just last week I denied a motion the government made for a variety of reasons, but I pretty much have very broad discretion on whether to grant that motion. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Mr. Lammers, why don't we go back to you. And you can tell me about why I should grant a 5K1.1 substantial assistance motion in this case.

MR. LAMMERS: Yes, Your Honor. Thank you. The defendant was arrested – it would have been this fall. He was arrested pursuant to an investigation where the task force purchased two ounces of methamphetamine from his codefendant.

After his arrest, the defendant provided a post-Miranda statement. He later then – after Mr. Binkard was appointed, he then proffered. We were able to use his information in grand jury, and he was a corroborative witness on one defendant that had

been a source of his, and he was a main witness on a second defendant. The two of them were kind of involved together. And they have since been indicted, and he is also a witness on a drug count – or excuse me, on a gun count that I have presented the [7] information to the grand. Jury on those same two defendants and –

THE COURT: So you're thinking about filing a superseding indictment on the gun count?

MR. LAMMERS: I am going to at some point hopefully. I'll be requesting a superseding indictment from the grand jury in regards to the gun count, but he's already given that information in the grand jury. And he has led to the indictment of these two defendants on –

THE COURT: On drug counts.

MR. LAMMERS: On the drug count.

THE COURT: What's the status of those indictments? Where are those cases at?

MR. LAMMERS: They're fugitives.

THE COURT: Oh.

MR. LAMMERS: They've been indicted, but they're – we just haven't gotten them arrested yet.

THE COURT: Well, are they fugitives or you just haven't arrested them yet? There's a difference.

MR. LAMMERS: Well, I understand fugitive is kind of a term of art.

THE COURT: I guess every fugitive you probably haven't – well, that's not true because some get arrested, get released on bond. Yeah.

MR. LAMMERS: I guess it's a term of art. The way I [8] see it is I think at least one of them knows that they were going to be arrested and that's why all of a sudden they're gone. Now, whether or not they have specifically been – they have not been arrested, bonded out, and then become a fugitive. But I think they know that they're targets. Let's put it that way.

THE COURT: So I imagine the likelihood of a Rule 35(b) motion would depend on whether or not they ever get arrested.

MR. LAMMERS: I have no concerns that we will arrest them. I don't – this isn't – these aren't a couple people with ties in other parts of the country. I think we'll get them and I'm guessing fairly short order.

THE COURT: Okay. Did the defendant do anything else?

MR. LAMMERS: No.

THE COURT: Okay.

MR. LAMMERS: He testified in grand jury and debriefed.

THE COURT: Using the 5K1.1 factors, can you run through them quickly for me?

MR. LAMMERS: I sure can, Your Honor. He was timely because he talked to us post-Miranda statement. We have not that I know of – and perhaps the defendant can –

THE COURT: Did he give a Mirandized statement after [9] he was arrested before he had a lawyer?

MR. LAMMERS: Yes, he did. And that's why I'm saying he was timely. He talked right away.

We did not have any concerns about his truthfulness or his reliability.

I don't know of any injury that – risk of injury because I haven't heard any information of people that have threatened him. Perhaps he has that information, but he hasn't passed that on to us at this point. So based on that we believe that a 15 percent reduction is appropriate.

THE COURT: And I'm assuming you're making that off the low end of the 97 months.

MR. LAMMERS: That's up to the Court, Your Honor.

THE COURT: Anything else you'd like to add?

MR. LAMMERS: No, Your Honor. Thank you.

THE COURT: Thank you. Mr. Binkard?

MR. BINKARD: May it please the Court and counsel. In evaluating the reduction, I'd like to make a few comments about the defendant's overall situation and then comment on the type of assistance he's given. He's got zero criminal history points, 24 years old. He had the misfortune of losing a brother who died in 1998 when the defendant was 19 and also of losing his mother in 2002 when the defendant was 23. His folks have been divorced. His father was a professor of agronomy in Illinois. He's present in the [10] courtroom.

THE COURT: And wrote a very thoughtful letter. Of the thousands and thousands of letters I've read in the last nine years, it was clearly one of the most thoughtful ones.

MR. BINKARD: The defendant was somewhat homeless from the summer of 2002 until February, March of 2003 when he came into contact with one of the codefendants, Alex Blankenship, who – he began living at his place, and then this drug activity came to be.

The defendant very much wants drug treatment. When he was first taken in and gave his post-Miranda statement, he stated, I'm an addict, and I want treatment. He does want treatment.

I discussed with him the possibility of a boot camp disposition, and he was reluctant to consider that until he was assured that he would get treatment in

such a disposition. No matter what, he wants drug treatment.

As a positive note resulting from the death of his mother, there is a trust fund available to provide education, tuition money for him if he gets into college. And if he doesn't use it for that, then he has to wait until he's 40 years old to get access to the money. So he has a potential financially to get some college. He's got a good academic background from high school. He was in the top half of his class, almost in the top third of his class. Some of the [11] classes he took, things like band and consumer education and so on, but also accelerated English; biology; German 1, 2, 3, and 4; chemistry 1 and 2; algebra 1 and 2; geometry; American literature; readings in reality; themes in literature; and current history.

I spoke with his dad, and his dad feels that he's got an excellent mind. Given an opportunity to use it properly, he could do some very good things.

Now, concerning the assistance that he gave, as has been indicated, immediately when he was arrested he opened up and told all, told on two of the people that were codefendants, maybe on the third – I don't have a note on that – one other supplier, three of his customers; made the comment, I'm addicted. So right immediately he got on board with assisting the government, came back and did an extensive debriefing – I made a list here – 10 or 11 people that he told about having drug activity including these 2 very active meth dealers here in Sioux City that

we've been – the Court was talking with the prosecutor about who've been indicted. He's given some very useful information in that regard, very timely.

The type of individual he is, it's reliable. It's been truthful, and they can count on him being an excellent witness to back these things up when the time comes.

In view of that, Your Honor, and the overall [12] situation, we feel that the Court should make a downward departure to a level or a point where the defendant would be eligible for the boot camp, intensive confinement alternative. I've spoken with him at length about that. That is something he wants. He wants to be kept track of, supervised, monitored so that he can have the best chance possible to stay off methamphetamine when he's ultimately released in the end. He has a very positive outlook on his situation. He made a comment when he was – early on that he was glad he got arrested; it was a good thing that that happened because he wanted to get away from meth. He wants to be away from meth.

With those things in mind, we'd urge that the Court make the departure so that he can get into the boot camp program.

THE COURT: Let me ask you something. Probation has recommended boot camp, and while I don't have a problem with sending Jason to boot camp, here's kind of the tougher decision I have to make. If you go to boot camp, you serve less time, but you don't get the 500-hour comprehensive residential

drug treatment program. You get some drug treatment, but I'm not really all that familiar with what the drug treatment program is in boot camp.

I'm real familiar with the 500-hour program because Yankton, for example, the prison at Yankton, has the largest [13] 500-hour residential drug treatment program in the country. And while I'm the number one populator of the prison at Yankton, I'm also the only federal judge in the country who goes there every other month and speaks to the groups in the drug treatment program, so I know a lot about it. I see people I've sentenced. I was over there last month and had a group of 30, 6 of whom I had sentenced to federal prison. It's a great program.

So, you know, the easy way out – I shouldn't say the easy way out. The way it works is if I give him a 30-month sentence and send him to Yankton, he does more time, but he gets a very intensive residential long-term drug treatment program that seems to have some promise. If I send him to boot camp, 30-month sentence, send him to boot camp, he does substantially less time but doesn't get as intensive drug therapy.

Now, he can always, you know, do the boot camp, hope for the best, and try and do some more intensive drug therapy while he's on supervised release. You know, that's obviously an option. It's kind of a difficult call for me to make. And I can certainly appreciate somebody wants to do the least time possible. That make sense?

MR. BINKARD: Your Honor –

THE COURT: But it's also a trade-off. Yankton is a very pleasant environment. It's the only one of the 108 [14] federal prisons on the site of a former private college. There aren't any bars. They have reasonably good educational programs compared to most Bureau of Prisons facilities. If you have to do time, I've always said it's the best place in the federal system to do it. Boot camp is obviously much more rigorous, much more intensive. You always have the possibility that you don't make it, you wind up serving your whole sentence anyway. So, you know, it's – I don't have a strong feeling one way or the other.

MR. BINKARD: I think – I'm probably in about the same position, and I'd like to defer to the defendant. He's an intelligent young man, and I think he understands what the Court has just said.

THE COURT: Yeah. Why don't we do this. Why don't we just take a short recess. I'm just going to stay on the bench. You shut your mikes off. You talk to Jason about it. And then I'll try and answer any questions that he has, and we'll ask Chad Zach, the probation officer, to try and answer any questions that he might have. And, you know, it's not a democracy in my courtroom. I usually don't give the defendant choices. But in this case – and I'd be interested in what the government has to say but less interested in that than other factors. But I'd be

interested in what he thinks and why he thinks that, and then I'll make up my mind.

MR. BINKARD: Okay.

[15] THE COURT: I'm not saying it's a free pass that you're going to get what you want, but you might; okay?

MR. BINKARD: Okay.

THE COURT: Okay. Thanks.

(Pause in proceedings.)

MR. BINKARD: May it please the Court. The defendant feels that even though it might take a longer time to get through the Yankton program and he wouldn't have the benefit of that intensive program of the boot camp, he feels that Yankton is probably the thing because of the quality of the program available there.

THE COURT: I'm very impressed.

Mr. Lammer's?

MR. LAMMERS: I don't have anything to add beyond initial recommendation, Your Honor. Thank you.

THE COURT: Thank you. Chad, do you know what the minimum time I can give the defendant and still qualify for the 500-hour intensive drug treatment program?

MR. ZACH: It'd have to be over a year, be the minimum.

THE COURT: Well, why don't we do this, Why don't you call the BOP and find out.

MR. ZACH: Okay.

THE COURT: Because we don't seem to get consistent answers. Last time I thought it was 24 months. I know it's [16] less than 30 months. But whether I can do 24, 18, or 12 and a day, but I'd like to know the answer to that question before I impose the sentence. Yeah, you just go call the BOP, and we'll wait for you.

(Pause in proceedings.)

THE COURT: Here's what Mr. Zach just told me. Technically it's 12 months, but because there's such a long waiting list, it's 24 months. I'm going to take a recess and call the warden.

MR. BINKARD: I'm Sorry?

THE COURT: I'm going to take a recess and call the warden and ask her. Actually she just called me earlier today, and I didn't get back to her on another matter. But I'm going to do that because I want to see if we can cut that time down a little bit. If we can't, fine. If we can – I've never done this before, but, you know, there's a first time for everything. So I'll try and make it as quickly as I can. Thank you.

(Recess at 1:53 p.m.)

THE COURT: Please be seated. Mr. Binkard, how long has Mr. Pepper been in custody? What? It's been about six months?

MR. BINKARD: About five and a half. October 1.

THE COURT: Here's the problem. I have to give him – minus the time he's going to get credit for which is [17] the 5 1/2 months, they have to have about 18 months in order to guarantee that he gets in the drug treatment program. If I were to give him like a year or a year and a day, he'd never qualify. If I give him the 18 months, it's really a 12-month sentence and he wouldn't get in.

MR. BINKARD: Sure

THE COURT: So I think I'm going to give him the 24 months recognizing that he'll get credit – by the time he gets there, he'll have about 18 months, and that will be time to get him into the drug treatment program. So I just wanted to make sure you understand. But I talked to the warden, Carolyn Sabol, and she said the problem is when – particularly when he's getting credit for time served, if I would give an 18-month sentence now, he'd get credit for that almost 6 months. By the time he was processed through the BOP and got to Yankton, he wouldn't – they wouldn't have time to put him into the drug treatment program.

MR. BINKARD: That's almost exactly the conversation I gave him or talked with him about during the recess.

THE COURT: And I was pretty sure that was it, but I've never actually talked to the warden about it. And she's as reliable as anybody could be. And so that's what I'm going to do; okay?

MR. BINKARD: Fine.

THE COURT: Mr. Pepper, you have what's called the [18] right of allocution. That's just a fancy legal term. It means you have the right to say anything to me you want to before I impose sentence. You don't have to say anything. You actually have a Fifth Amendment right under the United States Constitution to remain silent. If you exercise that right to remain silent, I cannot and will not hold it against you in any way. But if you'd like to say something, now is the time. Is there anything you'd like to say?

THE DEFENDANT: No, sir.

THE COURT: Okay. Mr. Binkard, anything else you'd like to add?

MR. BINKARD: No, Your Honor.

THE COURT: Mr. Lammers, anything else you'd like to add?

MR. LAMMERS: No, Your Honor. Thank you.

THE COURT: Okay. In the matter of United States versus Jason Pepper, I find that your total offense level is 30, criminal history category 1, United States Sentencing Guideline range of 97 to 121 months. The government's made a substantial assistance motion under United States Sentencing Guideline 5K1.1. Because you're safety valve eligible, that allows me to go below the 97-month bottom of the guideline range, and the mandatory minimum is waived.

In reviewing the substantial assistance factors under United States Sentencing Guideline 5K1.1, I'm going to [19] grant the motion, and I'm going to reduce your sentence to 24 months.

It's my judgment that you're hereby committed to the custody of Bureau of Prisons to be imprisoned for 24 months on Count 1. I'm going to recommend to the Bureau of Prisons that you serve your time at the federal prison camp in Yankton, South Dakota, and that you be placed in the 500-hour residential drug treatment program.

Upon release from imprisonment – upon release from imprisonment, you'll be placed on supervised release for five years. While you're on supervised release, you can't violate any state, local, or federal law. You can't possess a gun, firearm, or other dangerous device. And you can't possess any illegal drugs.

You'll have the standard conditions of supervised release, and you'll have three special conditions.

While you're on supervised release, you'll participate in a program of testing and treatment for substance abuse as directed by your United States probation officer.

Also while you're on your term of supervised release, you're prohibited from using alcohol, going to bars, taverns, and other establishments whose primary source of income is derived from the sale of alcohol.

And also while you're on supervised release, you'll be subject to a reasonable search policy. In other words, a [20] United States probation officer can search your person, car, residence, business upon reasonable suspicion that you're in violation of your terms of supervised release or otherwise using drugs.

And you don't have the ability to pay a fine, so I'm going to waive the fine. There's a hundred-dollar special assessment due and owing. You're remanded to the custody of the United States marshal to serve this sentence.

You have a right to appeal the sentence that I've imposed. If you decide to appeal, you need to file a notice of appeal with the clerk of our court within ten days from today's date. If you can't afford to pay for a lawyer or pay for the costs of an appeal, those costs will be paid on your behalf.

Mr. Pepper, do you have any questions about your sentence?

THE DEFENDANT: No, sir.

THE COURT: Mr. Binkard, anything further?

MR. BINKARD: No, Your Honor.

THE COURT: Mr. Lammers?

MR. LAMMERS: No, Your Honor.

THE COURT: Mr. Pepper, I did want to make one final observation. I hope you appreciate how lucky you are that you have the family support that you have. I have now sentenced I think between thirteen and fourteen hundred [21] people to prison in the nine and a half years I've been a United States District Court judge. I've had a lot of interesting cases, a lot of interesting memories.

Perhaps the most memorable experience I've had as a federal judge was real early in my career as a federal judge. I came out to sentence a woman who was from Sioux City. And when I read her presentence report, I noted that she had ten brothers and sisters all of whom lived in the Sioux City area. But this was her fifth felony conviction. And when I came out to sentence her, I anticipated seeing at least a good chunk of her family in the courtroom. And this would have been 1995. And I walked out on the bench, and there she was with her court-appointed lawyer, and there was a federal prosecutor at that table. The tables were a little bit different. It was before we had this high-tech courtroom. And there

wasn't a single person in the back of the courtroom. Not a single family member showed up.

And that is a haunting memory for me that I will carry to my grave. I just felt so incredibly sad for her that her family had just given up on her because I try – there are very few defendants I've ever given up on. I have great hope for the people. I've sentenced because I think you have a lot of promise, and certainly you have a lot, a lot of potential. You've made some bad decisions. We all make bad decisions.

[22] So I hope you will find comfort in the fact that you do have a lot of family support and try and use that family support to stay out of trouble. I've cut you a pretty huge break today. So when you're on supervised release for those five years, don't think that I have another break in me for you. I may or may not have, I don't know. But you shouldn't count on it.

So when you get out on supervised release, I'm going to expect that you're going to do very well because you may not get a second chance then. I can't predict the future. I don't know. But I just want you to know that you have been given a big break today. You earned it in my view, so it wasn't a benevolent gift from high on the bench here. You earned the break, and I'm pleased to give you the break, and I have no second thoughts or reservations or hesitations about giving you a break. I think your dad said it well in the letter that you have to temper justice with mercy, and that's what I've tried to do today.

So good luck to you. I hope I don't see you again. And you better hope you don't see me again, and I hope the time passes quickly for you. Yankton has some interesting educational opportunities where you can take some classes there with one of the local colleges, and so I hope you can avail yourself of that.

Let me just give you one last warning. It's a great [23] place to do time, but they don't have much tolerance. One of the days when I was over there leading my discussion group an inmate was getting bounced out of Yankton because his wife had moved to Yankton and she thought it'd be kind of neat to slip him a whopper from Burger King, so she took a Burger King sack with a Whopper in it and just dropped it in one of the corners by the bushes, and he went to pick it up, and they caught it on tape, and he was on his way up to Sandstone or a more secure federal prison. So they don't tolerate any nonsense there. But I think you'll do just fine. So good luck to you, and I hope the best for you.

Thank you, Mr. Binkard. We'll be in recess. Thank you.

(The foregoing sentencing was concluded at 2:10 p.m.)

[Reporter's Certificate Omitted In Printing]

United States District Court

NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: CR03-4113-004-MWB
JASON PEPPER	USM Number: 02739-029
	Bill Binkard Defendant's Attorney

THE DEFENDANT:

■ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii) & 846	Conspiracy to Distribute 500 Grams or More of Methamphetamine Mixture	10/01/2003	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in economic circumstances.

March 10, 2004
Date of Imposition of Judgment

/s/ Mark W. Bennett
Signature of Judicial Officer

Mark W. Bennett
Chief U.S. District Court Judge
Name and Title of Judicial Officer

3/17/04
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: twenty four (24) months on Count 1 of the Indictment.

■ The court makes the following recommendations to the Bureau of Prisons:

that defendant be designated to FPC Yankton, South Dakota, and be allowed to participate in the intensive substance abuse program.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: five (5) years on Count 1 of the Indictment.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. Defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as defendant is released from the program by the probation officer.

2. Defendant is prohibited from the use of alcohol and is prohibited from frequenting bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

3. The defendant shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the

defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100	$ 0	$ 0

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$_____	$_____	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine ☐ restitution.

  ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 United States Code for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ■ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed. .

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

(Pepper I)

**United States of America, Appellant,
v. Jason Pepper, Appellee.**

No. 04-2057

**UNITED STATES COURTS OF APPEALS
FOR THE EIGHTH CIRCUIT**

412 F.3d 995; 2005 U.S. App. LEXIS 12543

**December 13, 2004, Submitted
June 24, 2005, Filed**

COUNSEL: For UNITED STATES OF AMERICA Plaintiff-Appellant; Janet L. Petersen, John H. Lammers, U.S. ATTORNEY'S OFFICE, Sioux City, IA.

For JASON PEPPER Defendant-Appellee: Pro se Yankton, SD.

For William L. Binkard Defendant-Appellee: South Sioux City, NE.

JUDGES: Before MORRIS SHEPPARD ARNOLD, BEAM, and RILEY, Circuit Judges.

OPINION BY: MORRIS SHEPPARD ARNOLD

OPINION

MORRIS SHEPPARD ARNOLD, Circuit Judge.

The primary question presented by this case is whether the sentencing guidelines permit a district court to consider a matter unrelated to a defendant's assistance to law enforcement officials when determining how far to depart below the guidelines range pursuant to a departure motion based on the

defendant's assistance. *See* U.S.S.G. § 5K1.1. We conclude that the guidelines do not permit a court to consider such an unrelated matter and that the court did so here. We therefore remand this case for resentencing.

I.

Jason Pepper pleaded guilty to one count of conspiring to distribute 500 grams or more of a methamphetamine mixture; in his plea agreement, he agreed that he was responsible for distributing between 1.5 and 5 kilograms of a methamphetamine mixture. The court determined, and the parties agreed, that after accounting for Mr. Pepper's acceptance of responsibility and the fact that he was eligible for the so-called safety-valve reduction, *see* 18 U.S.S.G. § 2D1.1(b), the statutory minimum sentence did not apply and his base offense level under the guidelines was 30. The government, however, filed a motion pursuant to § 5K1.1 asking the court to depart below the guideline range of 97-121 months' imprisonment because Mr. Pepper (by a statement made shortly after his arrest and in grand jury testimony) provided information about two other individuals' involvement with illegal guns and drugs. More specifically, the government asked for a fifteen percent reduction, which would have resulted in a sentence of about 82 months, at the low end.

The court granted the § 5K1.1 motion and sentenced Mr. Pepper to 24 months in prison. The

transcript of the sentencing hearing reflects that the judge settled on the sentence after both he and a probation officer called officials at the Bureau of Prisons during breaks in the proceedings to determine the minimum term of imprisonment that the defendant could serve and still qualify for the intensive drug treatment program offered at the federal prison in Yankton, South Dakota. According to the judge, the Bureau of Prisons official told him that as a practical matter 24 months was the minimum term required for the program.

II.

Before we reach the heart of the case, we briefly address two threshold arguments made by the defendant. The first is that the government, in the plea agreement, waived its right to appeal the sentence. The agreement, in relevant part, reads as follows: "It is understood and agreed that even if a motion for departure is made by the government based upon the defendant's 'substantial assistance,' the final decision as to how much, if any, reduction in sentence may be warranted because of that assistance rests solely with the district court." Mr. Pepper maintains that this passage constitutes a waiver of the government's right to appeal because through it the government entrusts the final decision on the extent of the departure to the district court.

We decline to read the passage quoted from the plea agreement as a waiver by the government of its

right to appeal. The language of this passage convinces us that it is not a waiver of appellate rights, which typically employs more precise terms like "waiver" and "appeal," *see, e.g.*, *United States v. Benitez-Diaz,* 337 F.3d 1080, 1081-82 (8th Cir. 2003) (per curiam), but an explanation of the government's role in securing a substantial-assistance departure: the government can recommend a departure from the guidelines sentence, but only the court can grant one.

Mr. Pepper also asserts that we cannot review the extent of the departure. This argument is unfounded. While we cannot entertain a defendant's challenge to the extent of a downward departure, we can review an appeal of the same issue by the government. *United States v. McCarthy,* 97 F.3d 1562, 1577-78 n.5 (8th Cir. 1996). *See also United States v. Lawal,* 17 F.3d 560, 563-64 (2d Cir. 1994). This difference in treatment arises from the language of the statutory provisions that provide jurisdiction for appeals of sentencing issues, *compare* 18 U.S.C. § 3742(a)(3) *with* § 3742(b)(3); *see McCarthy,* 97 F.3d at 1577-78 n.5, and makes sense as a way of limiting the number of appeals, *see United States v. Colon,* 884 F.2d 1550, 1556 (2d Cir. 1989), *cert. denied,* 493 U.S. 998, 107 L. Ed. 2d 550, 110 S. Ct. 553 (1989).

III.

We now turn to the central issue of this case, namely whether the district court can base the extent of a departure made pursuant to a § 5K1.1 motion on

a consideration unrelated to the defendant's assistance. This issue matters because calculating the guidelines sentence remains an important part of the sentencing decision after *United States v. Booker,* 543 U.S. 220, 160 L. Ed. 2d 621, 125 S. Ct. 738, (2005), even when a departure is involved. *See United States v. Sierra-Castillo,* 405 F.3d 932, 936 n.2 (10th Cir. 2005). As this issue involves the interpretation of the guidelines, we review the district court's resolution of it *de novo. United States v. Mashek,* 406 F.3d 1012, 1016 (8th Cir. 2005).

Section 5K1.1 is entitled "Substantial Assistance to Authorities." It explains that a sentencing court may depart from the guidelines "upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person." U.S.S.G. § 5K1.1. It also includes a non-exhaustive list of considerations that could play a part in the district court's decision, all of which relate to the defendant's assistance to the authorities. U.S.S.G. § 5K1.1(a).

In earlier cases, we have touched on the question of what matters can be considered when determining the extent of a substantial-assistance departure motion, but we have never decided it. In *United States v. Anzalone,* 148 F.3d 940, 942 (8th Cir 1998), for example, we mentioned that the district court could "of course weigh" post-plea agreement drug use that was unrelated to the defendant's assistance in exercising its downward departure discretion pursuant to § 5K1.1. But this statement was dictum because the

question presented in that case was whether the government could consider non-assistance related matters when deciding whether to file a motion pursuant to § 5K1.1, not whether the court could consider such things. *See Anzalone,* 148 F.3d at 941. Also, in *United States v. Pizano,* 403 F.3d 991, 994-95 (8th Cir. 2005), we noted that while the background section of the commentary to the guidelines instructs courts to evaluate the "nature, extent, and significance" of a defendant's assistance, U.S.S.G. § 5K1.1 comment. (background), it does not state that these are the only legitimate considerations and adds, without embellishment, that "relevant factors" are to be considered. This pronouncement too was dictum, though, for we already had decided that the district court had not premised the extent of the departure on a consideration unrelated to the defendant's assistance. *See Pizano,* 403 F.3d at 994.

We hold that the extent of a downward departure made pursuant to § 5K1.1 can be based only on assistance-related considerations. Section 5K1.1(a) provides that "the appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following," after which it lists several sample considerations which all relate to a defendant's assistance. We do not think that the similarity of the examples is a coincidence. The interpretive canon of *noscitur a sociis,* which holds that words (like "but are not limited to") are known by their companions, *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575, 131 L. Ed. 2d 1, 115

S. Ct. 1061 (1995), is a familiar maxim, having been mentioned by the Supreme Court at least fifty-two times since 1805. *See, e.g. Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 6 L. Ed. 2d 859, 81 S. Ct. 1579, 1961-2 C.B. 254 (1961); *Lambert's Lessee v. Paine*, 7 U.S. 97, 134, 2 L. Ed. 377 (1805). That said, "had the Sentencing Commission wished to permit courts to consider factors unrelated to the quality of the defendant's cooperation when departing because of that cooperation, it seems likely that it would have promulgated a list of examples encompassing factors unrelated to cooperation." *United States v. Thomas*, 930 F.2d 526, 528, 529 (7th Cir. 1991), *cert. denied*, 502 U.S. 857, 112 S. Ct. 171, 116 L. Ed. 2d 134 (1991), *superseded on other grounds as stated in United States v. Canoy*, 38 F.3d 893, 904-07 (7th Cir. 1994). Buttressing this conclusion is the fact that the finely reticulated structure of the guidelines indicates that the commission was neither careless in its selection of examples nor bent on giving courts the sort of discretion that follows from allowing them to extend or shorten departures for any reason under the sun. We believe that the same arguments apply to the background section of the commentary to the guidelines.

Additionally, we note that a majority of the courts of appeals that have faced the issue have concluded that only assistance-related matters may be considered when determining the length of a departure pursuant to this section. *See United States v. Pearce*, 191 F.3d 488, 492, 493 (4th Cir. 1999); *United States v. Bullard*, 390 F.3d 413, 416 (6th Cir.

2004); *United States v. DeMaio*, 28 F.3d 588, 591 (7th Cir. 1994); *United States v. Auld*, 321 F.3d 861, 867 (9th Cir. 2003); *United States v. Campbell*, 995 F.2d 173, 175 (10th Cir. 1993); *United States v. Luiz*, 102 F.3d 466, 469 (11th Cir. 1996).

In this case, we conclude, the court considered a matter unrelated to Mr. Pepper's assistance, namely its desire to sentence Mr. Pepper to the shortest possible term of imprisonment that would allow him to participate in the intensive drug treatment program at the federal prison in Yankton. At the sentencing hearing, the court instructed the probation officer to "call the BOP [Bureau of Prisons] and find out" what is the "minimum time I can give the defendant and still [have him] qualify for the 500-hour intensive drug treatment program." After the probation officer reported that 24 months' imprisonment was the minimum, the court stated that it was going to call a short recess and phone the warden at Yankton "to see if we can cut that time down a little bit." Following the recess, the court expressed its intention to sentence Mr. Pepper to 24 months in prison because the warden stated that 24 months was, indeed, the minimum sentence that would allow Mr. Pepper to take part in the drug treatment program. The court's desire to sentence Mr. Pepper to the minimum term that would allow him to participate in the treatment program plainly does not relate to any assistance rendered by Mr. Pepper. Thus, we conclude that the district court determined the

length of the departure on the basis of an illegitimate consideration.

Having discovered an error, we must ascertain the appropriate remedy for it. If a district court has misinterpreted the guidelines, then under 18 U.S.C. § 3742(f)(1) we are obliged to remand the case for resentencing unless the sentence was not imposed "'as a result of'" the error. *Williams v. United States,* 503 U.S. 193, 203, 117 L. Ed. 2d 341, 112 S. Ct. 1112, (1992) (quoting 18 U.S.C. § 3742(f)(1)); *see Mashek,* 406 F.3d at 1015. "[A] remand is appropriate unless the revising court concludes, on the record as a whole, that the error was harmless, *i.e.,* that the error did not affect the district court's selection of the sentence imposed." *Williams,* 503 U.S. at 203.

The record does not demonstrate that the court would have given Mr. Pepper a 24-month sentence regardless of what matters the guidelines allow courts to consider in determining the extent of the departure. The court, for example, did not announce that the guidelines were irrelevant to its sentence. Also, given the pedestrian nature of Mr. Pepper's assistance, it is far from certain that the court would have arrived at the same guidelines sentence had it considered only assistance-related elements when deciding the extent of the departure. On the record before us, then, we cannot conclude that the misinterpretation did not affect the district court's selection of the sentence imposed, and we thus remand the case for resentencing. *See id.; Mashek,* 406 F.3d at 1020.

IV.

For the reasons given above, we remand this case for resentencing in accordance with this opinion and with the principles set forth by the Supreme Court in *Booker*.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JASON PEPPER, Defendant.	No. CR03-4113-004-MWB DEFENDANT'S MOTION FOR DEVIATION FROM ADVISORY SENTENCING GUIDELINES (Filed Feb. 24, 2006)

The Defendant, by and through his attorney, Patrick T. Parry, hereby makes the following motion for deviation from the sentencing guidelines. In support of this motion, the Defendant states the following:

1. The Defendant was originally sentenced on April 22, 2004, on drug related charges. The Eighth Circuit remanded this case for re-sentencing "in accordance with this opinion and the principals [sic] set forth by the Supreme Court in Booker. *U.S. v. Pepper,* 412 F.3d 995, 999 (8th Cir. 2005). The Defendant's new sentencing hearing is set for March 3, 2006.

2. The United States Supreme Court has determined that the Federal Sentencing Guidelines are no longer mandatory but are advisory in nature. *United States v. Booker,* 160 L. Ed. 2d 621, 125 S. Ct. 738, 756-57 (2005).

3. The Defendant requests that the Court deviate from the advisory guidelines based upon the Defendant's characteristics including: (1) post-offense rehabilitation; and (2) previous substance abuse issues which have since been resolved, which will reduce the risk of the Defendant's risk to the community; and (3) the sentencing disparities that can occur due to the availability of the drug treatment program.

4. The Defendant therefore requests that the Court deviate from the advisory sentencing guidelines in this case.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JASON PEPPER Defendant.	No. CR 03- 4113-4-MWB BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR DEVIATION FROM ADVISORY SENTENCING GUIDELINES (Filed Feb. 24, 2006)

The Defendant, by and through his attorney, Patrick T. Parry, hereby submits the following brief in support of the Defendant's motion for deviation from the advisory sentencing guidelines.

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I. FACTS

The Defendant, Jason Pepper, is before the Court for re-sentencing pursuant to a remand from the Eighth Circuit in *U.S. v. Pepper,* 412 F.3d 995, 999 (8th Cir. 2005). The Defendant was originally sentenced on April 22, 2004, on one count of conspiracy to distribute 500 grams or more of methamphetamine. On appeal, the Circuit Court found that the District Court erred in reducing the Defendant's guideline sentence under U.S.S.G. § 5K1.1 to 24 months imprisonment because the reduction was based, at least in part, on considerations unrelated to substantial assistance. The Eighth Circuit remanded this case for re-sentencing "in accordance with this opinion and the principals [sic] set forth by the Supreme Court in Booker. *U.S. v. Pepper,* 412 F.3d 995, 999 (8th Cir. 2005).

Jason Pepper is 26 years old. He has had severe alcohol and drug abuse issues since the age of 18, when he began using alcohol, marijuana, methamphetamine, cocaine and LSD. PSIR paragraph 54. The Defendant believes that his alcohol and substance abuse was exacerbated by the death of his brother when Jason was 18 years old and his mother when Jason was 22 years old. *See* PSIR paragraphs

46, 48. The death of his brother led to an attempted suicide and the death of his mother left him homeless. PSIR paragraphs 49, 52. The Defendant has no criminal history points under the sentencing guidelines.

On October 1, 2003, the Defendant was arrested on the instant charges and remained in detention until his sentencing date. On April 22, 2005, the Defendant was sentenced to 24 months imprisonment. The Defendant was received at the Yankton prison facility on April 9, 2004. While imprisoned, the Defendant completed the 500 drug treatment program. Due to the timing of the drug treatment program, the Defendant did not receive any time off of his sentence for completion of the drug treatment program. On March 10, 2005, the Defendant was transferred to a halfway house. On June 27, 2005, the Defendant was released from custody.

Since his release from custody, the Defendant Jason Pepper has been employed at MCI full time and has enrolled at Western Iowa Technical Community College where he has a 4.0 grade point average. Jason Pepper continues to comply with all conditions of supervised release and has lived a drug-free lifestyle.

II. ARGUMENT

1. The District Court has the authority to deviate downward from the sentencing guidelines.

The United States Supreme Court has determined that the Federal Sentencing Guidelines are no longer mandatory but are advisory in nature. *United States v. Booker,* 160 L. Ed. 2d 621, 125 S. Ct. 738, 756-57 (2005). The Eighth Circuit, in *United States v. Rogers,* 400 F.3d 640, 641 (8th Cir. 2005), has stated that:

> The guideline range 'no longer dictates the final sentencing result but instead is an important factor that the sentencing court is to consider along with the factors contained in § 3553(a) in reaching the sentencing result.' A sentencing court must consider the Guidelines, determine the applicable range, but may depart from the suggested Guideline range. Sentences are reviewed for unreasonableness. The standard guiding unreasonableness is 18 U.S.C. § 3553(a).

United States v. Rogers, 400 F.3d 640, 641 (8th Cir. 2005) (citations omitted). The District Court is therefore able to modify the sentence of a defendant if such a modification is reasonable under 18 U.S.C. § 3553(a). *See Rogers* at 642 (Unreasonable to sentence of probation where defendant had significant criminal sentence for felon in possession of firearm). "In the wake of Booker, the district court's duty at sentencing is not merely to calculate the appropriate Guidelines

range and then determine if a departure is appropriate. Rather, Booker requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." *United States v. Spigner,* 416 F.3d 708, 711 (8th Cir. 2005) (citations omitted). "[T]he court shall impose a sentence sufficient, but not greater than necessary, to account for the nature and seriousness of the offense, provide just punishment, deter criminal conduct, protect the public, and avoid sentencing disparities." *Id.* The court is not required to make "robotic incantations" that each 18 U.S.C. § 3553(a) factor has been considered, but the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be. *United States v. McMannus,* 2006 U.S. App. LEXIS 2670 (8th Cir. 2006). "There is a range of reasonableness available to the district court in any given case." *Id.*; *United States v. Saenz,* 428 F.3d 1159, 1164-65 (8th Cir. 2005). The Court has the authority to make a substantial change to a guideline sentence. The Eighth Circuit has previously noted,

> that while the deviation from the guidelines in [a] case is large, it is not unique. In *United States v. Rogers,* 423 F.3d 823 (8th Cir. 2005), our court affirmed a 360-month sentence for a defendant with a guidelines range of 57 to 71 months. In *United States v. Winters,* 416 F.3d 856 (8th Cir. 2005), a divided panel affirmed a 240-month sentence when the guidelines called for 177 to 191 months.

> Lastly, in *United States v. Christenson,* 403 F.3d 1006 (8th Cir. 2005), opinion vacated and district court judgment aff'd without opinion en banc by an equally divided court, 424 F.3d 852 (8th Cir. 2005) (en banc), the district court departed from a 240-month sentence to a 60-month sentence. Thus, large variances from guidelines sentences are not unprecedented.

United States v. Feemster, 2006 U.S. App. LEXIS 1630 (8th Cir. 2006). *See also U.S. v. Larrabee,* 2006 U.S. App. Lexis 2646 (8th Cir. 2006) (54% upward deviation reasonable based upon facts of case).

2. The Defendant's sentence should be reduced below the advisory guidelines due to his personal characteristics, previous substance abuse issues and post-offense rehabilitation.

The Defendant's personal characteristics, including his previous drug history, and the sentence necessary to protect the public must be considered by the Court pursuant to 18 U.S.C. § 3553(a). 18 U.S.C. § 3553(a)(1), (a)(2)(C); *United States v. Spigner,* 416 F.3d 708, 711 (8th Cir. 2005). This Defendant has a lengthy history of alcohol and substance abuse which has contributed to the instant offense. As mentioned, this Defendant had no other criminal history that warranted any points under the guidelines. Since this Defendant has remained clean and sober since October 1, 2003, and completed the 500 hour drug treatment program while in prison, he poses little

danger to the public. Even more significant is that this Defendant has been successfully living a drug free lifestyle since June 27, 2005, when he was released from the halfway house. Since the Defendant's release from custody, he has maintained full time employment and has enrolled in college, earning a 4.0 grade point average. Jason Pepper has made the necessary changes through his continued sobriety and his lifestyle that ensures that the public is protected from future crimes.

3. The Defendant's sentence should be reduced below the advisory guidelines to avoid sentencing disparities.

This Defendant completed the 500 hour drug treatment program and did not receive the typical one year reduction in his sentence due to the timing of the program. The Court can also consider that this Defendant did not receive a year off for completing the 500 hour drug treatment program, as the 24 month sentence he received would tend to correspond to a 36 month sentence for a Defendant that was not detained pending trial. This disparity in otherwise similarly situated defendants may be considered by the Court. 18 U.S.C. § 3553(a)(6); *see* 18 U.S.C. § 3621 (e)(2)(b)(Nonviolent offenders receive up to year off sentence for completing drug treatment program).

III. CONCLUSION

The Court has the authority to determine an alternative reasonable sentence that differs from the guideline range. *United States v. Booker,* 160 L. Ed. 2d 621, 125 S. Ct. 738, 756-57 (2005). The Defendant's individual characteristics, when considered in the aggregate, warrant a shorter sentence than that prescribed under the guidelines.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. CR03-4113-MWB
vs.	)	
JASON PEPPER,	)	
Defendant.	)	

GOVERNMENT'S RESISTANCE TO DEFENDANT'S SENTENCING MEMORANDUM

(Filed Mar. 13, 2006)

I. INTRODUCTION/BACKGROUND 1

II. ARGUMENT 1

1. *Defendant's drug and alcohol abuse* 4

2. *Post-offense rehabilitation* 5

3. *Sentence Disparity* 8

COMES NOW the United States of America and files its resistance to defendant's sentencing memorandum.

I. INTRODUCTION/BACKGROUND

Resentencing after remand is set for March 16, 2006. Defendant has filed a sentencing memorandum.

II. ARGUMENT

Defendant filed a request for variance below the sentencing guidelines due to personal characteristics, previous substance abuse issues post-offense rehabilitation, and to avoid sentence disparity. The government resists this request.

18 U.S.C. § 3742(g) deals with the extent of sentencing upon remand. 18 U.S.C. § 3742(g) requires that only issues raised before at the original sentencing, and instructions from the Court of Appeals in its opinion shall be considered at sentencing upon remand.

The Eighth Circuit granted a limited remand. "On remand for resentencing, . . . the sentencing court is bound to proceed within the scope of any limitations imposed by the appellate court." *United States v. Alaniz*, 413 F.3d 877, 878 (8th Cir. 2005) (internal quotation and citation omitted); *See also United States v. Walterman*, 408 F.3d 1084, 1085 (8th Cir.2005) (declining, in a direct criminal appeal after remand, to address a new argument based upon *Blakely*, which had not been advanced in the first sentencing proceeding, the first appeal, or in his second sentencing proceeding). *Cf. Children's Broadcasting Corp. v. Walt Disney Co.*, 357 F.3d 860, 2004 WL 111806, at *8 (8th Cir. Jan.26, 2004) (liability question was beyond scope of limited remand for new trial on damages).

For all these reasons, the defendant should not be entitled to raise anything at sentencing on remand

that was not raised before. None of the issues raised by defendant in his motion for variance was previously raised.

A. A Downward Variance Under 18 U.S.C. § 3553(a).

If the district court determines the downward variance motion will be heard, the Eighth Circuit has recently provided guidance on the procedure for determining variances since *Booker*.[1] In *United States v. McMannus* ___ F.3d ___, 2006 WL 250240 (C.A. 8 Iowa) the Court stated,

> The imposition of an unreasonable sentence is a violation of the law. *United States v. Frokjer,* 415 F.3d 865, 875 n. 3 (8th Cir. 2005). Although a sentence within the guidelines range is presumed reasonable, *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005), a district court may vary from the guidelines range based on the factors set forth in 18 U.S.C. § 3553(a). *See Booker*, 125 S.Ct. at 765. If the district court selects a sentence outside the guidelines range, the issue we face is whether there are factors under § 3553(a) that would make the sentence reasonable. *United States v. Haack*, 403 F.3d 997, 1003 (8th Cir. 2005). A sentence outside the guidelines range is not presumed to be reasonable.

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[1] *United States v. Booker*, 543 U.S. 220.

United States v. Wattree, No. 04-3151, slip op. at 8 (8th Cir. Dec. 15, 2005).

In order to assist us in discharging our responsibility of determining reasonableness, we have encouraged district courts to follow a procedure whereby they first determine the advisory guidelines range and then consider the factors set forth in § 3553(a) to determine whether to impose a sentence under the guidelines or a non-guidelines sentence. *Haack*, 403 F.3d at 1002-03. We do not require district courts to make "robotic incantations" that each § 3553(a) factor has been considered. *United States v. Lamoreaux*, 422 F.3d 750, 756 (8th Cir. 2005) (quoting *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005)). However, the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be. *See* 18 U.S.C. § 3553(c)(2) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is outside the [guidelines] range . . . , the specific reason for the imposition of a sentence different from that described."); *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) ("An extraordinary [sentencing] reduction must be supported by extraordinary circumstances."). We are mindful that the district court imposed McMannus's and Brinton's sentences prior to *Booker* and without the benefit of our subsequent decisions. However, district courts are expected

> to calculate correctly the guidelines range, *United States v. Mashek*, 406 F.3d 1012, 1017 (8th Cir. 2005), and state specific reasons for varying from that range. 18 U.S.C. § 3553(c)(2); *see also* 18 U.S.C. § 3742(f)(2) (requiring appellate courts to remand when the district court fails to provide reasons for its sentencing variance) . . .
>
> We review the reasonableness of a sentence for an abuse of discretion. *Dalton*, 404 F.3d at 1032. "There is a range of reasonableness available to the district court in any given case." *United States v. Saenz*, 428 F.3d 1159, 1164-65 (8th Cir. 2005). In choosing a sentence, a district court can abuse its discretion if it "fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of this case." *Haack*, 403 F.3d at 1004.

United States v. McMannus, 2006 WL 250240 *2-3.

Defendant argues the following factors for a downward variance under 18 U.S.C. § 3553(a): (1) drug and alcohol abuse (2) post-offense rehabilitation and (3) sentencing disparity.

(1) Defendant's drug and alcohol abuse. Defendant states that he has a lengthy history of drug and alcohol abuse that contributed to the instant offense.

The government does not dispute these allegations, but submits to the court that this factor does not justify a variance from the guideline sentence range. As this court is aware, numerous defendants have substance abuse problems, and this factor should not justify variance. The court should also note that defendant committed drug crimes which constituted sales of drugs as well as facilitated the transfer of drugs to others. These crimes are not of the possession variety.

(2) Post-offense rehabilitation. Post-offense rehabilitation that takes place behind prison walls after the original sentencing is not relevant to departure, since the sentencing court obviously could not have considered it at the time of the original sentencing. *United States v. Hasan*, 245 F.3d 682, 686 (8th Cir. 2001). Post-sentencing rehabilitative efforts are specifically disallowed as a departure basis at resentencing under USSG §5K2.19.

Allowing a downward departure on the basis of post-original sentencing rehabilitation is inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) for reducing the time to be served by a prisoner, see USSG §5K2.19, comment. (backg'd), and is inconsistent with the underlying goals of the Sentencing Reform Act as a whole, *see United States v. Sims*, 174 F.3d 911, 912-13 (8th Cir. 1999) (citing) (b). 28 U.S.C. § 991(b)(1).

Hasan, 245 F.3d at 689. Guideline §5K2.19, comment. (backg'd) states:

> The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced *de novo*.

While the government realizes that the district court has more discretion to consider a variance than a departure under the mandatory *pre-Booker* guideline scheme, this discretion should not be unfettered. The fact that defendant is currently employed and in school is certainly commendable, but good behavior and responsibility should be standard for any defendant on supervised release who is attempting to become a productive member of society. In short, defendant should not be rewarded simply for doing what he should be doing. "While a guidelines departure prohibition does not preclude the district court from considering that factor when the issue is a variance under *Booker*, the Sentencing Commission's policy statements show the need to explain" why a particular prohibited departure ground warrants leniency. *United States v. Gatewood*, ___ F.3d ___, 2006 WL 452902 (8th Cir. February 27, 2006).

A defendant should not benefit from having received an illegal sentence in the first instance. To

do so gives the defendant an unfair windfall vis a vis a defendant who was given a lengthier lawful sentence the first time around. Along these same lines, reducing a sentence based upon post-sentencing rehabilitation only causes disparity. Lawfully sentenced defendants do not have an opportunity to have their sentences reduced based upon good behavior while on release waiting to report to prison or while incarcerated. Defendants similarly situated as of the time of original sentencing, end up with disparate sentences for reasons not sanctioned by the USSC or by courts to date. "An excessively lenient sentence . . . causes cynicism, not only among people in prison, where the luck-of-the-draw sentencing interferes with rehabilitation, but among the law-abiding public." *United States v. Menyweather*, 431 F.3d 692, 708 (9th Cir. 2005) (Kleinfeld, J., dissenting).

"There is, we can hope, nothing atypical about obeying the law. [Defendant's] post-conviction activities here are hardly different from those of thousands of other offenders and thus cannot serve to take his case out of the heartland of those to which his guidelines apply." *United States v. Allery*, 175 F.3d 610, 614 (8th Cir. 1999). To the extent the defendant has made strides to better himself since committing the charged offense, these strides do not warrant a variance. "'A sentencing scheme which does not touch upon, or even recognize, that one can obviously and demonstrably reform one's actions cannot have been within the contemplation of Congress.'" *United States v. Desormeaux*, 952 F.2d 182, 185 (8th Cir. 1991) (holding

that defendant's post-offense rehabilitative conduct was the equivalent of acceptance of responsibility and did not serve as a basis for departure from the guidelines) (quoting *United States v. Floyd*, 738 F. Supp. 1256, 1259 n.5 (D.Minn. 1990)).

In the cases where the Eighth Circuit Court of Appeals has affirmed downward departures for post-offense rehabilitation, the rehabilitative efforts commenced before the defendants were subject to prosecution. *See United States v. Newlon*, 212 F.3d 423, 424 (8th Cir.2000) (prior to defendant's arrest on federal charges, defendant had, at his own request, entered a treatment program for his drug and alcohol addictions); *United States v. DeShon*, 183 F.3d 888, 889 (8th Cir. 1999); (defendant engaged in extraordinary post-offense rehabilitation efforts and accepted responsibility for his criminal conduct "during the investigation, but a year before his indictment"); *United States v. Kapitzke*, 130 F.3d 820, 823 (8th Cir. 1997) (defendant entered sex offender and chemical dependency treatment programs "voluntarily and before he was aware that federal charges would be filed against him."). The same should hold true for a variance. Defendant's rehabilitative efforts did not begin until after he was incarcerated.

In addition, a variance requires consideration of the factors set out in 18 U.S.C. § 3553(a). If defendant were granted a variance for his conduct that clearly occurred only because of his arrest and incarceration, this would cause disparity in sentencing among defendants. 18 U.S.C. § 3553(a)(6) manifests Congress's

concern for avoiding disparity in sentencing as it expressly instructs the district court to consider "the need to avoid unwarranted sentence disparities among defendant's with similar records who have been found guilty of similar conduct." *Hasan*, 245 F.3d at 687. Defendant cannot meet his burden for receiving a downward variance for post-offense rehabilitation.

(3) Sentence disparity

Defendant claims that he will receive an unfair sentence because he completed a drug treatment program and received no credit for it. This argument is without merit. The defendant did not receive time off for his drug treatment simply because his original sentence was so short. To maintain that this causes disparity stretches credulity. If defendant receives additional prison time, he can petition authorities for credit for the drug treatment program he has completed. Defendant's argument that he should receive a downward variance for disparity in sentence should be denied.

The United States requests the defendant's motion for variance be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JASON PEPPER, Defendant.	No. CR03-4113-004-MWB DEFENDANT'S SUPPLEMENT TO MOTION FOR DEVIATION FROM ADVISORY SENTENCING GUIDELINES (Filed May 2, 2006)

The Defendant hereby submits the following supplement to the Defendant's Motion for Deviation from Advisory Sentencing Guidelines:

1. Witness List

2. Exhibit List with Attached Exhibits

Respectfully Submitted,

/s/ Patrick Parry
Patrick T. Parry
FORKER AND PARRY
705 Douglas St., Ste. 300
Sioux City, IA 51101
(712)255-0189
(712)255-0431
ATTORNEY FOR DEFENDANT

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JASON PEPPER, Defendant.	No. CR03-4113-004-MWB DEFENDANT'S EXHIBIT LIST (Filed May 2, 2006)

The Defendant hereby gives notice that the following exhibits, which are attached, may be introduced in the sentencing scheduled for May 5, 2006, at 2:00 p.m.:

1. WIT Report Card
2. WIT – Academic Achievement President's List

Respectfully Submitted,

/s/ Patrick Parry
Patrick T. Parry
FORKER AND PARRY
705 Douglas St., Ste. 300
Sioux City, IA 51101
(712)255-0189
(712)255-0431
ATTORNEY FOR
DEFENDANT

[Certificate Of Service Omitted In Printing]

WIT
Community College

Western Iowa Tech Community College **FINAL GRADE REPORT**
Enrollment Services
4647 Stone Ave. **05/FA/SEMESTER**
P.O. Box 5199
Sioux City, Iowa 51102-5199

STUDENT: 0218247 Jason A. Pepper xxx-xx-xxxx

DEPT	CAT#	SEC	TITLE	CREDITS	GRADE	INSTRUCTOR
ENG	-105-0	5	Composition I	3.00	A	Theresa M. Jackson
CSC	-110-0	2	Introduction to Comp	3.00	A	Nancy H. Lanning
PSY	-111-0	4	Introduction to Psyc	3.00	A	Harold D. Renshaw
SDV	-100-0	1	Orientation to Colle	0.00	R	Credit Staff
SDV	-100-0	2	Orientation to Colle	0.00	R	Credit Staff
MAT	-102-0	3	Intermediate Algebra	4.00	A	Lisa L. Knecht

App. 94

PRIOR TERMS			CURRENT TERM			CUMULATIVE		
ATTEMPTED	COMPLETED	GPA	ATTEMPTED	COMPLETED	GPA	ATTEMPTED	COMPLETED	GPA
0.00	0.00	0.00	13.00	13.00	4.00	13.00	13.00	4.00

A EXCELLENT
B ABOVE AVERAGE
C AVERAGE
D BELOW AVERAGE
F COURSE REQUIREMENTS NOT MET
P PASSING
I INCOMPLETE
W WITHDRAWAL
AW ADMINISTRATIVE WITHDRAWAL
N AUDIT

ADDITIONAL LETTER GRADES
LISTED IN CATALOG

[LOGO]

- Western Iowa Tech Community College
  4647 Stone Avenue
  P.O. Box 5199
  Sioux City, IA 51102-5199
  712-274-6400
  800-352-4649
  Fax: 712-274-6412
  www.wicc.com

- Cherokee Campus & Conference Center
  Denison Campus
  Le Mars Center
  Mapleton Center
  Sioux City Campus

January 5, 2006

Jason A. Pepper
1331 S Maple Street #F12
Sioux City, IA 51106

Dear Jason:

Congratulations! You are recognized as a member of the Fall 2005 President's List for academic achievement. This recognition is awarded each semester to students who have completed 12 or more graded semester credits and achieved a 4.0 GPA.

You are to be commended for your outstanding academic work this semester. I wish you continued success in the future.

Sincerely,

/s/ Carolyn Rants
Carolyn Rants, Ed.D.
Dean of Students

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

JASON PEPPER,

Defendant.
/

No. CR03-4113

TRANSCRIPT OF
RESENTENCING

The Resentencing held before the Honorable Mark W. Bennett, Chief Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, May 5, 2006, commencing at 2:10 p.m.

APPEARANCES

For the Plaintiff: JOHN H. LAMMERS, ESQ.
Assistant United States
Attorney
Terra Centre - Suite 670
600 Fourth Street
Sioux City, IA 51101

For the Defendant: PATRICK T. PARRY, ESQ.
Forker and Parry
Suite 500
705 Douglas Street
Sioux City, IA 51101

Also present: Chad Zach, U.S. Probation

Reported by: Shelly Semler, RMR, CRR
320 Sixth Street
Sioux City, IA 51101
(712) 233-3846

* * *

[15] prior to ever being arrested, but that is extremely rare. He was very timely.

In terms of injury suffered or risk of injury to the defendant or his family, again, want to note that he did provide some firearm information about Perez and Hamel. Certainly I don't think there's any clearcut evidence that he personally was at any risk because he was in custody. However, he's giving information regarding dangerous individuals to the government, and certainly his family wasn't in custody at the time. So in terms of risk of injury to the defendant or his family, there is something of a factor there.

Other than that, I don't have anything else to add, Your Honor.

THE COURT: Why don't we move into the variance issue. You have the burden of proof.

But let me ask you – before we move into the variance, let me ask you this, Mr. Lammers. Do you have a view as to how I'm supposed to factor in – my understanding is I gave the defendant 24 months and he discharged that sentence. You don't disagree with that, do you, that he discharged his sentence?

MR. LAMMERS: No. I would have no reason to dispute that.

THE COURT: Well, I just, you know, want to make sure if you agree or disagree.

[16] MR. LAMMERS: I don't know when he got out. I'm assuming since he's sitting here out of custody that he discharged that.

THE COURT: He discharged it last June. You didn't know that?

MR. LAMMERS: I didn't know specifically. I've seen what Mr. Parry has filed, but I didn't know the specific date.

THE COURT: Okay.

MR. LAMMERS: But yes, he discharged that sentence.

THE COURT: What am I supposed to do with that 24-month sentence in terms of giving him credit? Do you have view as to how I should treat that 24-month sentence?

MR. LAMMERS: I guess I'm not sure what you're asking me.

THE COURT: Well, it's a little bit different situation than we usually have. Usually we have a situation where somebody's – you know, they've gone in – after they plead guilty, they go into custody, and the BOP winds up giving them credit for the time

that they've been in federal custody. This is a little bit different because he's now discharged his sentence.

MR. LAMMERS: Uh-huh. I would say he'd have to get credit for that 24 months.

THE COURT: He would have to get credit for it.

MR. LAMMERS: I can't see any other way to look at it.

[17] THE COURT: Right.

MR. LAMMERS: I certainly wouldn't think that there would be any logical way to say that he has to, if you were to sentence him to prison again, not get credit for that.

THE COURT: Right, so he should get credit for the 24 months, sentence that he's discharged. You don't disagree with that, do you?

MR. LAMMERS: I'm aware of no law that would provide that he wouldn't get credit.

THE COURT: Okay.

MR. LAMMERS: And to me logically it would make sense that since he's done it and discharged it that he should receive credit for it.

THE COURT: Okay. Do you think the Bureau of Prisons is the one that gives him credit for that or I'm the one that gives him credit for that?

MR. LAMMERS: I've never been in this situation. I don't know.

THE COURT: I have, but I've never actually dealt with this issue.

MR. LAMMERS: I don't know the answer to that.

THE COURT. Do you have any problem if I give him credit for 24 months?

MR. LAMMERS: Again, I don't know how it works. In the absence of any authority that – I don't see a problem with [18] that.

THE COURT: I don't see how there could be a problem because its undisputed as you've agreed that he's discharged a 24-month sentence.

MR. LAMMERS: Yeah, I don't dispute that, Judge.

THE COURT: Okay.

MR. LAMMERS: I'm sorry I'm not tracking, I just have never been in this situation.

THE COURT: No, I think you are tracking. I'm just asking if you have any problem with me giving credit for 24 months.

MR. LAMMERS: No.

THE COURT: Okay. Do you, Mr. Parry?

MR. PARRY: No, Your Honor.

THE COURT: Okay. Now why don't we go to the variance issue.

MR. PARRY: Thank you, Your Honor. I'd like to call Jason Pepper.

THE COURT: Okay. Mr. Pepper, please come forward. I'll swear you in.

JASON PEPPER, DEFENDANT, SWORN

THE COURT: Okay, Please be seated. Would you state your full name and spell your last name.

THE WITNESS: Jason Alan Pepper, P-e-p-p-e-r.

THE COURT: Thank you.

[19] Mr. Parry?

MR. PARRY: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. PARRY:

Q. Jason, the first thing I want to run down with you is kind of a time line of the time that you were in custody and when you've been out. Do you remember approximately when it was that you were first arrested on this charge?

A. October 1, 2003.

Q. Okay. And were you placed into custody at that time?

A. Yes.

Q. Did you ever get out of custody at any time while the original case was pending?

A. No.

Q. So you were in custody all the way up through the time of sentencing in your original case?

A. Yes.

Q. When you – do you remember the date of your sentencing?

A. March 10, 2004.

Q. And so at that point you'd been in custody nine months approximately?

A. I – whatever that adds up to. I'm not sure.

Q. Okay. And you were sentenced to 24 months.

A. Yes.

Q. When were you discharged from prison or released from [20] prison?

A. I was released from FPC Yankton – I believe it was March 10 of last year, and I was released from the halfway house in Council Bluffs June 27.

Q. Okay. So you were – after you were sentenced – I guess I want to run this by you – you first went to Yankton until March 10 of 2005?

A. Yes.

Q. Okay.

A. I believe that's correct.

Q. So you would have been there approximately a year?

A. Yes.

Q. And then you went to the halfway house in Council Bluffs?

A. Yes.

Q. And that was for about another three months approximately?

A. Yes.

Q. And then you were released on June 27.

A. Yes.

Q. Upon your release on June 27, 2005, where did you reside?

A. The apartment that I live in now, Morningside Country Estates.

Q. And that's in Sioux City; right?

A. Yes, in Sioux City.

Q. While you were in custody, did you have the opportunity to take advantage of the 500-hour drug treatment program?

[21] A. Yes, I did.

Q. What'd you think of that program?

A. I – I believe it helped me tremendously get back on track as to where I needed to be as far as my goals and my habits, things of that nature.

Q. Did you think prior to going to prison that you needed drug treatment?

A. Yes.

Q. What was the impact on your life that your drug usage had prior to going to prison?

A. I would say it was destroying it if not had already destroyed any chance of normalcy. I guess as far as health issues, I didn't have any at the time that I knew of, but I was severely underweight, so I would guess that if I would have continued on the path I either would have came up with severe health issues or death, I guess the worst-case scenario.

Q. Now, obviously because your criminal history has zero points you didn't have any significant criminal history except for the instant offense before you went into custody. Did you think, however, that you were going to pose a risk to the community if you continued to use drugs?

A. As far as a risk, I guess are you – are you asking a risk as far as like violence, or I'm not sure what kind of risk –

Q. Well, doesn't have to be necessarily a violent risk but . . .

[22] A. I think that I would have continued to do what I was doing which was selling drugs to support a bad habit that I had, and it was just a downward spiral, so I guess the risk to the community would have been I would have continued to sell drugs. I would have continued to harm other people by doing that.

Q. And since you've had the drug treatment program and you've obviously been released for almost a year now even from the halfway house, do you still believe that you pose a risk to the community?

A. No, I don't.

Q. And why is that?

A. I don't use drugs anymore. I have no desire to use drugs anymore. So, therefore, I'm not selling drugs I guess because the sole purpose of me selling the drugs was to be able to use them. I'm trying to get on with my life and do something positive with it.

Q. Now, Jason, you a – obviously you completed the 500-hour drug treatment program. Did you get the one-year credit off your sentence for completing that program?

A. No.

Q. And why is that?

A. I didn't have enough time to receive any credit. I didn't even have enough time to spend the six months in the halfway house.

Q. So you basically had to rush through your program just to [23] get it done.

A. Yes, I got in the next available class once I got to Yankton.

Q. And was that important to you at the time?

A. Yes.

Q. Now, since you've been released from custody and you've been living in Sioux City since June of 2005, right –

A. Yes.

Q. – what have you been doing with your life since then?

A. I enrolled at Western Iowa Tech Community College full time last fall and have since completed that semester. I also had a job at MCI. Transportation issues came up, and I actually had to quit that job and then also after that got a job at Bomgaars which is closer to my house, so I was able to get to work every day, and I've been working at Bomgaars part time and going to school full time.

Q. Okay.

A. Since last fall.

Q. And let me break it down a little bit. You started attending WIT in the fall?

A. Yes.

Q. So you went the fall semester. Are you still enrolled at WIT?

A. Yes.

Q. And when does the semester finish?

[24] A. I believe the last final is either May 17 or 18.

Q. And are you hoping to achieve some type of a degree from WIT?

A. I am not sure if it will be from WIT or from another community college, but my hope is to go on to a four-year college and at least get a bachelor's degree.

Q. And how would you describe your grades at WIT?

A. Last semester I got all A's in my classes. This semester I'm not doing as well, but I still have all C's and above.

Q. I'm going to hand you what's marked as Defendant's Exhibits 1 and 2. Have you seen those before?

A. Yes.

Q. And briefly can you identify what Exhibit 1 is?

A. It's a copy of my report card from last semester.

Q. And Exhibit 2 is what?

A. It is a letter from the dean of students at WIT.

Q. And does that dean of students' letter relate to you?

A. Yes, it's a letter to me congratulating me on my 4.0 GPA for the semester.

MR. PARRY: Move for the admission of Defendant's Exhibits 1 and 2.

* * *

(Defendant Exhibits 1 and 2 were offered.)

* * *

THE COURT: Any objection?

[25] MR. LAMMERS: No, Your Honor.

THE COURT: They're received.

* * *

(Defendant Exhibits 1 and 2 were admitted.)

* * *

BY MR. PARRY:

Q. And obviously based on Exhibits 1 and 2 and your testimony, for fall semester at least you got straight A's?

A. Yes.

Q. And this semester you said you're not doing quite as well. Do you anticipate, though, that you're going to be able to pass all your classes this semester?

A. Yes.

Q. Now, in terms of employment, when did you first get that job at MCI?

A. believe it was maybe a couple weeks, a week or two after I was released from the halfway house, so middle of July I think is when I started there.

Q. So within a few weeks you first started working at MCI.

A. Yes.

Q. Do you remember when you stopped working at MCI?

A. I think I worked there for about a month, and like I said, the person I was riding to work with because I don't own a vehicle actually was fired from there, and I called my supervisor and told him there's really nothing I could do to get [26] to work and ended up having to quit that job.

Q. How long was it before you secured employment at Bomgaars?

A. I believe it was three weeks to a month. I had put applications in everywhere that I could find that was close enough to get to on my own so . . .

Q. And since that time I think you're saying basically what? September then you would have started working –

A. It was –

Q. – at Bomgaars?

A. No, it was the beginning of October that I act – was my first day. I may be wrong on how long I was working at MCI. I know there's about a month in between working at MCI and actually starting at Bomgaars, and I started at Bomgaars the first or second week of October I believe.

Q. And you've already indicated you're going to school full time. And about how many hours a week do you work at Bomgaars?

A. Twenty to thirty.

Q. And how's that employment going?

A. Good.

Q. Mr. Pepper, you're obviously still on supervised release; right?

A. Yes.

Q. How is that for you? Have you had any problems complying with any of the recommendations or requirements?

A. No.

[27] Q. Any dirty UAs, anything like that?

A. No.

Q. Have you always made sure that you attended all your meetings that you're supposed to with your probation officer – I'm sorry, not your probation officer, with U.S. Probation to verify that you are actually following through with all of your requirements?

A. Yes.

Q. Mr. Pepper, is there any differences that you can point to between your life prior to your arrest in October of 2003 and now in terms of how you think you are as a person? Do you feel you've made any changes?

A. Definitely. As far as differences as like where my life was headed, my life was basically headed to either where – I guess where I ended up, in prison, or death. Now I have some optimism about my life, about what I can do with my life. I'm glad that I got this chance to try again I guess you could say at a decent life. That – I mean, that would be the major difference. My life was going nowhere before, and I think that it's going somewhere now.

Q. Do you think that you're ever going to be likely again to commit any type of crime?

A. No, I don't believe so. I don't believe that I would ever go back to what I was doing. Because of the drug treatment program, I understand a lot of why I was doing what I was doing. [28] I have no reason to go back to that.

MR. PARRY: Thank you. No further questions.

THE COURT: Mr. Lammers, any questions for the defendant?

MR. LAMMERS: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. LAMMERS:

Q. Mr. Pepper, you weren't selling drugs solely to support your drug habit; isn't that correct?

A. As far as I can tell, I was.

Q. You remember when we proffered, when you gave your statement to law enforcement; right?

A. Yes.

Q. And didn't you tell them at the time that you first got into it so that you could get some extra money to pay Alex Blankenship for rent, or at least that was part of it?

A. I may have – I don't recall saying that. I may have said that.

Q. But it's possible that you were also using your drug sales to pay your bills.

A. Possibly, yes.

Q. And you were dealing drugs to quite a few people, weren't you?

A. Yes.

Q. In fact, you had quite a list of folks that you were [29] bringing – think you were bringing what? Eight-balls and perhaps a little more?

A. Yes.

Q. How many people do you think you were dealing to?

A. Maybe 10, 15.

Q. Maybe 15 different regular customers?

A. At any – I guess at any given time, yes.

Q. Now, you had dealings with Lorrie Perez and Steve Hamel; is that fair to say?

A. Yes.

Q. In fact, you're the one that introduced them, Lorrie, to Alex Blankenship; correct?

A. That's correct.

Q. Alex had his own source, Mr. Sandoval, didn't he?

A. That's correct.

Q. But you introduced him to another source, Lorrie Perez.

A. Actually I introduced him to them before he started dealing with Felipe Sandoval.

Q. They were your first source?

A. (Witness nodded head.)

Q. And then he dealt with Felipe later?

A. I guess I wouldn't look at it as two different – or a first and a second. Just two different.

Q. It was all sort of ongoing, wasn't it?

A. Yes.

[30] Q. So she was involved with multiple pounds of methamphetamine, wasn't she?

A. Yes.

Q. And you knew that.

A. Yes.

Q. In fact, she was involved with – I think by her own admission she was involved with dealing over a hundred pounds of methamphetamine over the course of her conspiracy. You may not know that exact

number, but you would agree she was a big drug dealer.

A. Yes.

Q. And that Steve Hamel was a big drug dealer.

A. Yes.

Q. And you didn't get held accountable for any of their drug weight, did you?

A. No, not that I – I guess I didn't see the calculation as to how it was calculated for me.

Q. When you went through your plea agreement with your attorney –

A. Yes.

Q. – you agreed that the drugs that you were involved with were drugs that you and Mr. Blankenship were involved with, not Lorrie Perez's – or excuse me, Lorrie Perez's drugs; right?

A. Correct.

Q. So you didn't get held accountable for that part of the [31] conspiracy, did you?

A. I guess no, I don't believe so.

MR. LAMMERS: I don't have any other questions. Thank you, sir.

THE COURT: Mr. Parry, any follow-up?

MR. PARRY: No, Your Honor.

THE COURT: You may step down. Have any additional evidence?

MR. PARRY: I do, Your Honor. I'd like to call Gary Pepper.

GARY PEPPER,
DEFENDANT'S WITNESS, SWORN

THE COURT: Okay. Please be seated. Make yourself comfortable. Please adjust the microphones. And when you're ready, would you state your full name, please, and spell your last name.

THE WITNESS: Yes. My name is Gary Eugene Pepper, P-e-p-p-e-r.

THE COURT: Thank you.

Mr. Parry?

MR. PARRY: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. PARRY:

Q. Mr. Pepper, how are you related to Jason Pepper?

A. He's my son.

Q. In the presentence investigation report – and I don't [32] think you've ever had a chance to see that – it describes that there was some – I don't know if it was animosity but certainly a strained relationship

between yourself and your son prior to his arrest in October of 2003. Is that fair to say?

A. That would be a conservative way to say it because I really for five years or so didn't have a relationship with my son. I didn't even know where he was.

Q. Did you have any idea what he was doing?

A. No, sir. Well, I sensed that he was doing something bad probably related to drugs, but I had no information.

Q. Had you had any contact with him shortly before his arrest in October 2003?

A. Not shortly before. During that five years or so, there was one time that Jason called up, and he told me he didn't have a place to stay, that he had to leave where he was at. But the tone of his voice didn't sound like he was rational or sober. I don't know if it was alcohol or if it was drugs that at that point in time were messing him up. And I sensed that what he basically wanted me to do was send him money, and I wasn't about to do that, but I was willing to help him find a place to live.

And from my home in St. Joe, Illinois, I got on the telephone, and I talked to people here in Sioux City looking for homeless shelters, places that Jason could go to and be safe.

And so I called Jason back on the telephone, and he just went berserk, refusing to even consider those

as an [33] alternative, and he slammed the phone down, and that was it. And the next time I knew anything about him was when he had been arrested, and that was only because his former stepdad gave me a call to let me know the situation.

Q. And that was arrested on the instant offense?

A. Pardon me?

Q. On these charges. It would have been –

A. Yes, sir.

Q. – October of 2003 or later?

A. Yes, sir.

Q. And so what kind of contact did you have with him while his case was pending?

A. I think we – I think we may have made three trips to Fort Dodge. Maybe I only made one trip by myself, but my wife and went at least a couple of times together. So we went to see Jason while he was at Fort Dodge. And then we went I think to Yankton at least two, maybe three times to visit him there. And then when he got to the halfway house, we went to see him shortly before he was released from there. So during the time he was locked up, we did have some communication. And after going for roughly five years with none, it was still good.

Q. And so that was really when you re-established your relationship with your son?

A. Yes.

Q. Now, obviously you live in Illinois right?

[34] A. Yes.

Q. And since he's been released in June of last year, have you had any chance to continue a relationship with Jason?

A. Well, certainly. I've been here to visit him. He came home shortly after the first of the year, came back to St. Joseph, Illinois, for a few days to visit and stayed with us in our home. And that was, of course, the best visit that I've had so far with him because it was – well, it was just home. And so – and it was multiple days in duration, so I think it was – it was by far the best visit.

Q. Since he's been released from custody last year, how would you describe him? Does he seem like he's a different individual than the little contact you had with him beforehand?

A. Well, much more mature than when he left home to move to Iowa. Of course, he had just recently graduated from high school at that point. But sensible in thinking, mature in attitude, serious in terms of planning for the future, those types of phrases would describe what I see in Jason now that when he left home after high school graduation, they weren't there.

Q. Knowing him since his release, have you seen any indication that he's continued to use drugs in any way?

A. No, sir, no.

Q. Any indication that he's abused alcohol?

A. No, sir.

[35] Q. Do you think that he poses a danger to the community now?

A. In his current state of mind, I see none, no, sir.

Q. What do you think a reasonable sentence is in his case? He received 24 months originally, and he's back here on remand. What do you think would be a long-enough sentence to make him consider the seriousness of his crimes and account for the wrongdoing that he took part in?

A. Well, I think the appropriate sentence has got to be long enough to get a person's thinking in the right direction, to help them change their way of thinking about how to make money, how to live life, how to go back to day-to-day routines. And I don't know that – I don't know that there's a particular length of time. Maybe it changes with different persons.

But that drug rehab program that Jason had at Yankton, he and I talked about it; some of the things he learned. We've had the chance to visit about that.

And it truly sobered him up, made his -- made his way of thinking change.

And so I guess the appropriate length of a sentence should first consider how long does it take to get that person's thinking turned around.

Q. Do you think he's there?

A. I do, yes. I think that his conscientious nature now about going to work on time, doing good job there, going to school, doing a good job there, that just shows me he's a different person than he was when I didn't know where he was at.

[36] Q. Do you think more prison time would be more likely to help him continue in a responsible life?

A. No, sir.

MR. PARRY: Thank you. No further questions.

THE COURT: Mr. Lammers, any questions for this witness?

MR. LAMMERS: No thank you.

THE COURT: You may step down. Thank you. Mr. Parry, any additional evidence?

MR. PARRY: Yes. Thank you, Your Honor. I'd like to call Chad Zach from U.S. Probation.

THE COURT: And let me just say this before you can call Mr. Zach. Normally I get a confidential – well, not normally. In every case I get a

confidential recommendation from the probation office with regard to their recommendation as to appropriate sentence. In 99.99 percent of the cases or even higher, I've never discussed the PSIR with the probation officer until after I get their recommendation, and I only say 99.99 percent. I think maybe once or something or twice in 12 years I've discussed a – with the probation officer what they thought the likely guideline range might be, but it's – I've done it less than two or three times, less than three times I'm sure.

So the first time I ever get probation officer's recommendation or that I've ever had any discussion with the probation office is after – is when I get the presentence [37] report. Along with it I get a confidential recommendation. And for the most part I've kept that confidential.

Just yesterday in a very similar case I went ahead and made it a court exhibit, and I don't intend to set a precedent by doing it, but am going to do it again today.

And so I've had copies made of the confidential sentencing recommendation dated March 8, 2006, and I have a copy that I'm going to hand to my law clerk Jill and ask her to mark that as Court Exhibit A, Court Exhibit A or Court Exhibit 1, however you choose to do it. And I'm going to make that part of the record in the case. And I've asked Mr. Zach to make copies of it so that counsel have it. And believe counsel have had it.

Have you had time to read it, or do you need a short recess to read it?

MR. LAMMERS: I've had sufficient time. Thank you, Your Honor.

THE COURT: Okay. And I'll want to give you an opportunity somehow – if you want to object to me making it a court exhibit and part of the record, I'll give you an opportunity to object to it. Would you like to object?

MR. LAMMERS: No. I simply wish to cross-examine the probation officer after Mr. Parry's finished. I don't have an objection to the Court's making it an exhibit. I think you're entitled to make court exhibits.

[38] THE COURT: I would think so. And you'll be sure and have an opportunity to cross-examine him. And even if Mr. Parry hadn't called him, I was going to make him available to you to examine because I don't think it's fair for me to put the written confidential recommendation into the record without you having a chance to cross-examine the probation officer. So that was my plan.

MR. LAMMERS: Thank you, Your Honor.

THE COURT: So having said that, Chad Zach, if you'd please come forward, I'll swear you in.

CHAD ZACH,
DEFENDANT'S WITNESS, SWORN

THE COURT: Thank you. Please be seated. Make yourself comfortable. Adjust the microphones. And when you're ready, would you state your full name, please, and spell your last name.

THE WITNESS: My name is Chad Zach. Last name is Z-a-c-h.

THE COURT: Mr. Parry?

MR. PARRY: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. PARRY:

Q. Mr. Zach, how long have you been employed with the U.S. Probation Office?

A. It's going on approximately four years.

Q. Do you have any idea of how many cases you've handled at [39] all during that time?

A. Roughly it varies around 40 to 50 presentence reports a year.

Q. Okay. So over the 4-year time frame, were talking what? 160 reports maybe?

A. Around there.

Q. Now, Mr. Zach, the Court's made your sentencing remand memo to the Court a court exhibit in

this case. Obviously you prepared that report; correct?

A. That's correct.

Q. I kind of want to visit about parts of this report with you. I guess the first thing I want to talk to you about is have you had an opportunity to actually meet with Jason Pepper, Mr. Zach?

A. During the presentence phase, I did a personal interview with him, and then following his discharge from the Bureau of Prisons, I've had some phone contact with him, yes.

Q. And I know that you've spoken with me on at least a few occasions about his case; right?

A. That's correct.

Q. And I know that you've received, for example, Exhibits 1 and 2 that are in front of you. You've seen those I think since February of this year?

A. That's correct, yes.

Q. And so you've been aware of generally how his progress's [40] been since he's been released from prison?

A. I am aware, and I also keep tabs with his supervising probation officer also.

Q. And do you know who that is?

A. Yes, Matt Sturdevant.

Q. Has Matt Sturdevant given you any cause for concern that Jason Pepper hasn't been fully complying with all the requirements for supervised release?

A. No.

Q. No dirty UAs, anything like that?

A. He's complied fully with all of his terms of supervised release.

Q. Now, Mr. Zach, in your report to the Court – and I guess I – what do you generally call these? Are these a – what do you call these reports to the Court?

A. This is just a sentencing memorandum to the judge for this remand sentencing.

Q. In your sentencing memorandum, you basically go step by step through all of the factors in 3553(a), and you break them down one by one. Is that fair to say?

A. That's correct.

Q. And you have a copy of the report in front of you; right?

A. Yes, I do.

Q. And in your report you – in your sentencing memorandum, excuse me, you do indicate that he's got a minimal criminal [41] history. He's been compliant while on supervised release, maintained employment. And it appears that based on those characteristics

you're saying that he has a low probability to commit future crimes; is that right?

A. That is correct. He was a criminal history category 1. He was safety valve eligible. He's been discharged for about a year now. He's not committed any crimes, and I think he's been sober since his arrest.

Q. And obviously you can't predict with any kind of specific accuracy as to whether or not he will commit any crimes in the future. That's just your best recommendation based on the information you have available to you?

A. Yes, he's considered a low-risk offender.

Q. And is that based on your experience as a probation officer?

A. That's my experience and my discussions with his supervising probation officer.

Q. You also, going on to page 3 of your sentencing memorandum, kind of break down the percentage decrease in sentence based upon substantial assistance of some of the other cases that relate to this defendant; right?

A. That's correct.

Q. And according to your report, it appears that Jose Martin Barragan-Torres received a reduction of 26 percent; is that right?

[42] A. That is correct.

Q. And it appears Mr. Blankenship who we've already heard quite a bit about that apparently the defendant was living with, he received a reduction of 70 percent?

A. That is correct.

Q. And I note that in your summary of Mr. Blankenship's case, the government does not apparently right now appeal that 70 percent reduction in sentence for Mr. Blankenship.

A. From the records I saw on the court records, they initially appealed it. That appeal was dismissed. However, the defendant – defense counsel in that case has an appeal with that case.

Q. Okay. So the defense attorney has an appeal pending as far as you can tell, the government has dismissed their cross-appeal or their original appeal?

A. I believe so, yes.

Q. And then on page 4 it goes on to Felipe Sandoval who obviously is one of the individuals Jason Pepper gave information about that was involved with a firearm. That individual received a 50 percent recommendation – or rather a 50 percent reduction in his sentence based on substantial assistance; correct?

A. That is correct.

Q. And you also note that the government is not appealing Felipe Sandoval's 50 percent reduction in sentence.

[43] A. That's correct. There was no appeal.

Q. Do you know what the actual percentage recommendation was awarded to this defendant based upon substantial assistance in the original sentencing?

A. Mr. Pepper?

Q. Yes.

A. What his reduction was?

Q. Yes.

A. I believe his reduction was 75 percent.

Q. So it was only 5 percent more than Blankenship's case.

A. That's correct.

Q. And obviously Mr. Blankenship I would have to guess had a more significant criminal history based upon your summary of his case on page 3 since he had a prior drug felony conviction.

A. That is correct. He was subject to the 240-month mandatory minimum. In that case he got both substantial assistance motions so that that mandatory minimum was waived.

Q. So when comparing Mr. Blankenship's case and Jason Pepper's case, I guess the notable difference is 75 percent versus 70 percent and Mr. Blankenship had a more significant criminal history.

A. That's correct.

Q. Your recommendation on page 5 – rather, I'm sorry, paragraph just shortly before the recommendation on page 5 is your recommendation based on some of the sentencing variance [44] factors as to whether or not the Court should vary from the advisory guidelines in the case. And it appears that your recommendation is that a 24-month sentence would appear reasonable in conjunction with the substantial assistance reduction, is that right?

A. That's correct.

Q. Do you still feel that way?

A. Yes, I do.

Q. An a probation officer with your experience and obviously your experience with this particular defendant which has been substantial, do you absolutely believe that the defendant's current sentence that he has already received and discharged of 24 months is sufficient to protect the community?

A. Absolutely. That's the main reason of that 24-month sentence recommendation.

Q. Do you think that it's a – it was a long-enough sentence to account for the nature and seriousness of the offense?

A. I believe he has learned his lesson, yes.

Q. And do you think that that sentence is unfair in the sense that it's too much shorter than some of

the other individuals involved in the same offenses and offense conduct that he was involved with?

A. I don't know about unfair, but I think in this case it was justified because he's shown to the Court – he's been out for a year and has done remarkably well.

[45] MR. PARRY: Thank you. No further questions.

THE COURT: Mr. Lammers?

MR. LAMMERS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. LAMMERS:

Q. Good afternoon.

A. Good afternoon.

Q. What is your knowledge of the guidelines' treatment of post-sentencing rehabilitation?

A. They may be considered. As a departure or –

Q. Is it a prohibited factor under the old mandatory guidelines? My question was poor. Is it a prohibited factor under the mandatory guidelines?

A. Post-sentencing?

Q. Yeah.

A. I don't know if its prohibited, but it probably has to be very exceptional.

Q. Not post-offense.

A. I'd have to take a look at the guideline in particular.

Q. That would be important to know in making a recommendation, wouldn't it?

A. For a variance?

Q. Yeah.

A. I take everything – I take the guidelines where they're going to be and all the other factors.

[46] Q. And obviously it's a different standard. A variance and a departure are different standards.

A. A departure's by the guidelines, that's correct.

Q. The Court has more leeway in a variance; is that right?

A. I agree with that.

Q. There's some case law that talks about the fact that even under the new more discretion or more leeway to the Court when there's a prohibited factor that's under consideration, you still have to be able to explain why a variance is appropriate when it would have previously been prohibited; would you agree?

A. I'd probably agree with that, yes.

Q. And drug and alcohol addiction, in fact, prohibited factor, isn't it?

A. Yes.

Q. Can't consider it under the old guidelines. Under the new guidelines you can consider it – excuse me. That's a bad question as well. Not under the new guidelines but under the new regime where the Court can grant a variance, it can consider it. But again, when it's a prohibited factor, you have to be able to justify more than a different type of variance; would you agree?

A. Variance is justified in my opinion, whether or not the guideline range – whatever the guidelines say the range is, whether or not that range is reasonable, taking everything into account, drug and alcohol use, criminal history, his living

* * *

[56] MR. LAMMERS: I wasn't intending to go into who he was discussing things with and what various input was.

THE COURT: Right. I think you're entitled to know how he breaks it down.

MR. LAMMERS: That's what I was simply asking.

THE COURT: Yes.

BY MR. LAMMERS:

Q. So in order to get to the 24 months, where's the jumping-off point for the variance? Do you understand my question?

A. Yeah, I didn't have one.

Q. Then how do you determine whether or not a variance is reasonable, the extent of the variance is reasonable?

A. Because I don't know how much weight the Court's going to put into substantial assistance today, so how am I supposed to determine that?

Q. And that's a fair point, but do you see what I'm saying? How do you come up with a specific – what amount of departure or variance is reasonable, or are you just saying 24 months is reasonable? In and of itself that's it. You don't care about percentage of variance, but 24 months is the sentence the Court should come to?

A. If you're talking about variance percentages, in my opinion 24 months is a sentence I come up with that's reasonable.

Q. Okay. That's the question I was asking. Thank you.

[57] MR. LAMMERS: I don't have any more questions.

THE COURT: Mr. Parry, anything further?

MR. PARRY: Yes. Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. PARRY:

Q. Mr. Zach, you were the probation officer that actually prepared the original presentence investigation report; correct?

A. Yes.

Q. And in – do you have a copy of that report in front of you?

A. No, I don't.

Q. I'm going to hand you a copy of your report. Is that the amended and final draft of Jason Pepper's pre-sentence investigation report?

A. Yes, it is.

Q. Would the defendant and the government have had opportunity to make objections to your draft presentence investigation report?

A. Yes.

Q. Can you tell based upon looking at your draft of the – your final draft of the presentence investigation report whether or not the government made any objections?

A. There were no objections by either party.

Q. And would the government as part of its objection have been able to request a higher base offense level based upon the

* * *

[66] MR. LAMMERS: Thank you, Your Honor. I think the defendant's to be commended for the fact that he's in school, that he's employed. But that's what defendants are supposed to do.

THE COURT: But very few do it.

MR. LAMMERS: Well, that's true.

THE COURT: But they're all supposed to do it.

MR. LAMMERS: But they should. They should.

THE COURT: It's the difference between the real world and the ideal world.

MR. LAMMERS: Right. But they should. I mean, they're required to. And that's why we put them on supervision, and that's why we monitor them, and that's why we watch what they do.

That being said with appropriate commendations to him for his behavior, a 24-month sentence is an unreasonable sentence. It's unreasonable based on the fact that – and if you take a look at – I understand the way Mr. Parry did the numbers, but let's look at it a different way.

Let's say if the Court were to grant him in excess of the departure recommended by the U.S. Attorney's Office for substantial assistance, if we start there, if you were to even go all the way up to 50 percent and 50 percent – and I know the Court has disagreed with

this or has some different opinion based on the opinion you wrote in Saenz, but the Eighth Circuit [67] at this point has said a 50 percent departure is an extraordinary departure.

THE COURT: Yeah, and I have to follow it whether I agree with it or not, and I intend to follow that in this case.

MR. LAMMERS: But let's say, let's say even if you went to there and you went 50 percent, by my math that puts his guideline range or puts him at 48 months. If you went another 50 percent, that gets him 24 months. That's a 50 percent variance.

THE COURT: No, but it depends on how you look at it. It's not a 50 percent variance off the original sentence.

MR. LAMMERS: It's a 50 percentage variance from where you departed to.

THE COURT: Right, but it's not off the original sentence.

MR. LAMMERS: No, the total departure from the 97 months to 24 months is 75. My point is you have to calculate it first. The guideline range comes first; then the variance comes. And a 50 percent variance is extraordinary, especially in light of the fact that the variance is based in this particular instance – and I understand – I don't mean to – I don't mean to try and play games with the math.

THE COURT: No, there's different ways of looking at the math, though, right.

MR. LAMMERS: I understand it's a 75 percent total [68] when you consider everything. But either way it's a substantial variance assuming that the Court were to go to 50 percent.

THE COURT: I'm not going to go to 50 percent in this case.

MR. LAMMERS: I would pitch the argument that 50 percent is too high and have obviously based on my recommendation of 15 percent. But at any rate –

THE COURT: Would you be open to the possibility that 15 percent might be a little low?

MR. LAMMERS: Well, obviously, Your Honor, that decision is up to you. We make the recommendation based on what we believe the totality of the circumstances is. Lorrie Perez dumped all over herself. Steve Hamel – he provided grand jury testimony against Steve Hamel. I think the characterization of it by the Eighth Circuit that it's pedestrian, I think that's probably an appropriate characterization.

THE COURT: Does pedestrian equate to average?

MR. LAMMERS: I think so.

THE COURT: Okay.

MR. LAMMERS: I think so.

THE COURT: So under the United States Sentencing Guideline study that was just done, in terms of the degree of substantial assistance, the average departure in a federal drug case was 46.5 percent. And the average departure nationwide for all defendants who engage in substantial assistance was 49.9 [69] percent.

MR. LAMMERS: And that –

THE COURT: So if pedestrian translates to average, then I guess I ought to be doing a 46.5 reduction in this case.

MR. LAMMERS: Well, I don't know that I would go so far as to say that because average doesn't necessarily mean that they all have to be at the same place. This defendant –

THE COURT: Actually it was the median. Half the defendants received a departure greater than 46.5 percent, and half the defendants received a departure less.

MR. LAMMERS: And I have no reason to argue that that's what that study says. I've not read it personally. But at any rate –

THE COURT: Did you read the Saenz opinion that I wrote?

MR. LAMMERS: I did.

THE COURT: Then you pretty much read the study because I cited it at length in there.

MR. LAMMERS: I did note that you cited the study at length, and I did read that.

But I think you have –

THE COURT: But I have to follow the Eighth Circuit law, not the study.

MR LAMMERS: I think that's really what it comes down to, and I think the Eighth Circuit in this case says pedestrian [70] and says 50 percent is extraordinary. I would say that really that puts the high end or the high end of the range to be 50 percent in this set of circumstances.

THE COURT: For a substantial assistance departure?

MR. LAMMERS: For a substantial assistance departure. I don't agree – I don't grant that 50 percent is where you should go, but again –

THE COURT: And I'm not going to go that high because I don't think it would be appropriate in this case under Eighth Circuit law.

MR. LAMMERS: Well –

THE COURT: I think it would be appropriate under the rationale that I articulated in the Saenz opinion, although there were independent reasons why I also found it to be extraordinary in that case that don't exist in this case. So if I were just free to say I ought to be able to do what every other district court judge in the country does on a national average, I'd do a 50 percent departure in this case.

But I'm not free to do that. I have to follow the Eighth Circuit law which means I have to find that his substantial assistance is extraordinary, and I don't think it was extraordinary. It was average, but it wasn't extraordinary.

MR. LAMMERS: And I guess with that –

THE COURT: So we're on the same wave length.

MR LAMMERS: With that from the Court, then I'll [71] address simply the variance.

* * *

[83] THE COURT: And I think you know I mean that sincerely.

MR. LAMMERS: I appreciate your comments, Your Honor. Thank you.

THE COURT: Anything else you'd like to add?

MR. LAMMERS: No. Thank you.

THE COURT: Mr. Parry, anything else you'd like to add?

MR. PARRY: No, Your Honor.

THE COURT: Okay. Well, I'm going to take the substantial assistance departure first. And I'm going to depart 40 percent because that's what I think the departure's worth in this case under existing Eighth Circuit law.

If the Eighth Circuit would reevaluate their position in light of my Saenz opinion – I'm not optimistic that they would because I think it's hard to admit when you're wrong, especially for a Court of Appeals to do that, so I hold no hope that they're going to do that. I think they are wrong, and think almost every district court judge believes they're wrong. But I have no realistic hope that they're going to change their mind.

But if they did, then I agree with Morris Sheppard Arnold that this is a pedestrian or average amount of substantial assistance and under national statistics in my view would be entitled to a 50 percent reduction.

[84] And based on just my anecdotal discussion with other judges, there are a whole host of other judges around the country in districts ranging from Alaska to Florida, California to New York that routinely give 50 percent or more for exactly what this defendant did, and there's no question about that in my own mind based on my own experience in talking to district court judges and talking to federal public defenders – I'm on the Federal Defender Services Committee – and in reading the study done by the sentencing commission.

But I'm bound by Eighth Circuit law, and I'm going to uphold the Eighth Circuit law whether I agree with it or not. In this case I don't agree with it, but we'd have chaos if district court judges didn't follow the Eighth Circuit. They're obviously higher up

the food chain, and we have to give their opinions the utmost respect and follow them even though we can disagree with them.

So I think this case is entitled to something less than a 50 percent reduction because while the defendant was very timely, was incredibly truthful and candid, engaged in debriefing, engaged in proffer, engaged in grand jury work, was very timely, it was just that.

And so I think a 40 percent reduction given how timely he was and how truthful and honest he was would be appropriate in this case. So I'm going to reduce it by 40 percent. So I think that takes us down to a sentence of 58 months.

[85] And, Mr. Parry, I'm really not trying to copy you, and it might either be that great minds think alike or tortured minds think alike, but I saw this case virtually identically as the way you did. And so I am going to do a variance down to 24 months.

And Mr. Lammers raises an interesting point. It's kind of playing with statistics. It's about a 30, 35 percent variance if you look at it off the total sentence. If you look at it off the 58 months, it's obviously significantly higher than that. But I think what the defendant has done in this case is exceptional.

I adopt as my findings of fact the recommendation marked Court Exhibit 1 or A, whatever its been

marked, which is the confidential recommendation from the probation officer. I agree with it in this case.

I might add that on the question of the defendant's prior criminal record, I think one of the very early variance decisions by Chief Judge Loken – I don't recall the name, but I think it was where a judge considered the fact that the defendant had a little criminal history and did a variance, and I've probably been guilty of doing that up until that opinion came down, and Judge Loken said in that opinion essentially that it was double counting. You know, he's already given credit for that in the criminal history category 1.

But in this case I note that Mr. Zach said no history [86] of violence, and I think that is something that we consider in terms of a variance. Not only did he not have any criminal history – he's already been counted for that – but he has no history of violence because you could have a history of violence in your record without – and have a criminal history or not have a criminal history. So I think that's important to make that distinguishment.

But I certainly agree with the government that in general criminal history's already calculated into the advisory guideline range and we can't be using the things that are calculated in the advisory guideline range to then do a further reduction for a variance.

To my knowledge I have never based disparity among codefendants as a reason for a variance. You know, I may have forgotten that I've done it on some

rare occasion in the past. I've rejected it out of hand numerous times, innumerable times. Earlier this week when I wound up in a resentencing giving the same sentence that I gave earlier, I rejected that out of hand in that case.

But in this case I think it does have some application. And while I'm not giving a lot of weight to it, I think looking at the Blankenship sentencing and the Jose Sandoval sentencing that if I didn't do a substantial variance in this case there would be sentencing disparity in the case, although that isn't one of my primary factors for doing the [87] variance. I'd say it would be a supporting factor.

But really Mr. Zach said it all, so I'm just going to adopt his memorandum dated March 8, 2006, as my finding of fact and adopt the testimony of both the defendant and the defendant's father – there wasn't anything that was really sharply contradicted by the government and – as my findings of fact.

And I specifically find that – that under 3553(a) my obligation is to impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in paragraph (2), and I won't read all of paragraph (2), but it includes the need for a sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public from further crimes by the defendant. And I think a sentence of 24 months establishes that mandate.

I'm convinced that this defendant, Mr. Pepper, is an extremely low risk of recidivism, that nobody has a crystal ball. I can't stand here and say you'll never go out and commit another crime. But I think of all of the defendants that I see in sentencings and in revocations of supervised release you are a prime candidate not to be a reoffender. And so I have a high level of hope that I think some day will turn out to be a high level of confidence that Mr. Pepper will not reoffend.

I think it's adequate to afford deterrence to criminal [88] conduct and to reflect the seriousness of the offense and to promote respect for the law and to provide just punishment in this case.

You know, I don't know whether or not it's appropriate to consider the release – the year he's been out now, almost a year, how well he's done. He's gone back to school. He's gotten straight A's. You make an argument in your brief that I shouldn't consider that. And, you know, maybe you're right. And maybe on that alone it's going to come back to me on resentencing.

But as a – I'm a practical judge. And it seems to me if you can't consider what the defendant's done this last year there's something wrong with our sentencing system. I mean, what's the best thing to look at? How has the defendant done the last year since he's been out of prison? Certainly if he'd been out there committing other crimes, I'd want to know that and on resentencing I would certainly give a

much higher sentence than I gave today, and I don't think the government would remain silent and say, Post-offense conduct isn't relevant in sentencing – in resentencing, Your Honor; we're not going to tell you about the five other crimes he's committed in the last year. I think the government would be dying to tell me, and I'd be dying to know because that would be an important factor to consider.

And I think if the court ultimately says it's not an [89] important factor to consider or it's not a factor that I can consider if I want to in the exercise of supposed considerable discretion that I'm going to have, it just, doesn't make much sense to me. It just doesn't make much sense that I can't look at the last year of the defendant's life and say he's done exceptionally well. Yeah, every defendant should do that well, but the bottom line is 98 percent of them don't do nearly as well.

And so I have considered that. If that's impermissible, you know, its impermissible. It can come back to me for resentencing, and I'll be glad to try and get it right the third time. The third time may be a charm. But I'm not going to be disingenuous and say that I haven't considered the defendant's post-release conduct because I have considered it. Exactly how much weight I'm giving it, I don't know exactly. I don't have a formula. I'm just trying to give what I think is a reasonable sentence in the exercise of district court discretion.

And, you know, the circuit keeps saying that we're in a better position to make these judgments, although they keep reversing federal district court judges who make those judgments in the variances saying that it's unreasonable. But in my judgment it is reasonable. If the Eighth Circuit disagrees, they disagree, and I'll be happy to redo the resentencing. I won't like it, but I'll be happy to redo it.

[90] I just wish they would give us more deference because I'm making the tough decisions based on the information that I have, my evaluation of the defendant who I've had a chance not only to sentence but resentence, to study very carefully the presentence report, to review very carefully Court Exhibit Number 1, the recommendation of the probation officer. And I'm just trying to do the best that I can in the exercise of my judgment.

And, you know, you did have something in your brief about, you know, the defendant shouldn't get the benefit of the illegal sentence I gave him before. And, you know, that has some appeal to me, but it wasn't the defendant's fault that I screwed up. I screwed up all on my own. And so I'm not sure I should penalize the defendant because he's been out for the last year and he's done extraordinarily well.

And I'll just say it again. Any sentencing scheme that ignores that is not a sentencing scheme based in the reality of the human life and human existence that I have to make judgments on every single day

when I sentence defendants. So that's how I feel about it.

So I'm going to give you – I'm giving you the same sentence I originally gave you which is the 24 months, and you've already discharged that sentence. So you'll be free to leave. You're on your term of supervised release. Good luck on your term of supervised release. And I've tried to do what I [91] think is a reasonable sentence.

And I'm probably going to get in trouble for saying this, but, you know, it's very hard to sentence people. I've now sent over 1,400 people to federal prison. It's not an easy task. I've given numerous life sentences. I've given more 360-to-life sentences than I can ever encounter.

But for the Court of Appeals to ask me to send somebody back to prison after they've been out and doing well for a year, I hope they don't ask me to do that on remand of this case because I'm not sure I have it in me to do that. I just think it would be incredibly unfair, would violate every principle of sentencing I've come to understand. It might be the technically legal thing that has to be done, but I would hope a United States Court of Appeals judge would volunteer to take this case by designation and impose that sentence. I'll impose it if they make me. But it's not a sentence that I think would be fair. I don't think it would advance any purpose of federal sentencing policy or any other policy behind the federal sentencing guidelines to send this defendant back to

prison. But I've been wrong before. And if I have to do it, I have to do it. But I don't think it would be the appropriate sentence.

Now, I'd like to give the government an opportunity to object to both the fact that I've done a variance in this case and to the extent of the variance. Mr. Lammers?

MR. LAMMERS: Based on the record that we've made, I [92] would advance those objections including an objection to the extent of the downward departure. That's all I have. Thank you.

THE COURT: I was going to add that too, that you should object to the extent of the downward departure as well because I didn't want to foreclose you from doing that. But you picked up on that. So I appreciate that.

Mr. Parry, anything further?

MR. PARRY: No, Your Honor.

THE COURT: Okay. Thank you. We'll be in recess. Good luck to you, Mr. Pepper. Thank you.

You know what? My court reporter wisely just reminded me I do need to advise you of your right to appeal. I should say you might to go see a psychiatrist before you would file a notice of appeal, but I do need to advise you that you do have a right to appeal the sentence that I've imposed. If you decide to appeal, you need to file a notice of appeal with the clerk of our court within ten days from today's date.

If you can't afford to pay for a lawyer or pay for the costs of an appeal, those costs will be paid on your behalf. Thank you.

Thank you for reminding me, Shelly. We'll be in recess.

(The foregoing resentencing was concluded at 4:03 p.m.)

[Reporter's Certificate Omitted In Printing]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA	**AMENDED JUDGMENT IN A CRIMINAL CASE**
V.	(Filed May 10, 2006)
Jason Pepper	Case Number: CR03-4113-004-MWB USM Number: 02739-029
Date of Original Judgment: March 10, 2004 (Or Date of Last Amended Judgment)	Patrick Parry Defendant's Attorney

Reason for Amendment:

- ■ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(h))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant
☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

■ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii) & 846	Conspiracy to Distribute 500 Grams or More of Methamphetamine Mixture	10/01/2003	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ is/are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days

of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 5, 2006
Date of Imposition of Judgment

/s/ Mark W. Bennett
Signature of Judge

Mark W. Bennett,
Chief U.S. District Court Judge
Name and Title of Judge

5/10/06
Date

IMPRISONMENT

* The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 24 months (time served) on Count 1 of the Indictment.

* The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years on Count 1 of the Indictment.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

■ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the

defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. Defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as defendant is released from the program by the probation officer.

2. Defendant is prohibited from the use of alcohol and is prohibited from frequenting bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

3. The defendant shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100	$ 0	$ 0

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$_____	$_____	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ■ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States of America, Appellant,
v. Jason Pepper, Appellee.

No. 06-2453

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

486 F.3d 408; 2007 U.S. App. LEXIS 11885

March 13, 2007, Submitted
May 21, 2007, Filed

COUNSEL: For United States of America, Plaintiff-Appellant: John H. Lammers, U.S. ATTORNEY'S OFFICE, Sioux City, IA.

For Jason Pepper, Defendant-Appellee: Patrick Thoams Parry, FORKER & PARRY, Sioux City, IA.

Jason Pepper, Pro se, Sioux City, IA.

JUDGES: Before RILEY, BOWMAN, and ARNOLD, Circuit Judges.

OPINION BY: RILEY

OPINION

RILEY, Circuit Judge.

This case returns after a remand to the district court for resentencing. In *United States v. Pepper,* 412 F.3d 995, 999 (8th Cir. 2005) (*Pepper I*), we held the district court erred by granting a 75% downward departure for substantial assistance and imposing a sentence of 24 months' imprisonment, because the district court erroneously based the extent of the

departure on matters unrelated to Jason Pepper's (Pepper) assistance. On remand, the district court granted a 40% downward departure (five offense levels) for substantial assistance, followed by a 59% downward variance (eight offense levels), and again imposed a sentence of 24 months' imprisonment. The government appeals. We reverse.

I. BACKGROUND

Pepper pled guilty to conspiracy to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. Pepper's total offense level of 30 and criminal history category I produced an advisory United States Sentencing Guidelines range of 97 to 121 months. Pepper was eligible for safety-valve relief, thus the statutory mandatory minimum sentence of 120 months' imprisonment did not apply. *See* 18 U.S.C. § 3553(f), U.S.S.G. §§ 2D1.1(b)(6), and 5C1.2. In Pepper's initial sentencing, the government filed a motion for substantial assistance, pursuant to U.S.S.G. § 5K1.1, and recommended a 15% downward departure. The district court departed downward 75% and sentenced Pepper to 24 months' imprisonment. We reversed, finding the district court erred by considering factors unrelated to Pepper's assistance in granting the § 5K1.1 downward departure motion, and we remanded, concluding "given the pedestrian nature of Mr. Pepper's assistance, it is far from certain that the court would have arrived at the same guidelines sentence had it considered only assistance-related

elements when deciding the extent of the departure." *Pepper I*, 412 F.3d at 999.

On remand, the district court found Pepper's assistance merited a 40% downward departure, which reduced the bottom of the advisory sentencing Guidelines range to 58 months. Then, under 18 U.S.C. § 3553(a), the district court granted a downward variance of 59%, based on Pepper's post-sentencing rehabilitation, lack of "violent" history, and, to a lesser degree, on the need to avoid unwarranted sentencing disparity among co-defendants. The district court again imposed a sentence of 24 months' imprisonment. This appeal followed.

II. DISCUSSION

A. Substantial Assistance Departure

The government argues the district court abused its discretion by granting a 40% downward departure given the pedestrian nature of Pepper's assistance. We review for abuse of discretion the extent of a reduction for substantial assistance. *United States v. Coyle*, 429 F.3d 1192, 1193 (8th Cir. 2005).

At the resentencing hearing, the government described Pepper's assistance, which included debriefing with law enforcement immediately after his arrest, a proffer interview, and testifying before the grand jury against two defendants. The government acknowledged Pepper was the main witness against one of the two defendants.

Although there is no bright line percentage or mathematical formula to determine when the extent of a substantial assistance departure becomes unreasonable, *see,* e.g., *United States v. Haack,* 403 F.3d 997, 1005 (8th Cir. 2005), some proportionality must exist between the defendant's assistance and the extent of the departure; for example, an extraordinary departure must be supported by extraordinary circumstances, *see,* e.g., *United States v. Saenz,* 428 F.3d 1159, 1162-65 (8th Cir. 2005) (concluding a 68% substantial assistance downward departure (eleven offense levels) was "excessive and unreasonable under the circumstances"); *United States v. Dalton,* 404 F.3d 1029, 1030, 1033-34 (8th Cir. 2005) (concluding there were no extraordinary circumstances to support the extraordinary 75% downward departure (thirteen offense levels), aff'd after remand, 478 F.3d 879 (8th Cir. 2007)). But see *United States v. Pizano,* 403 F.3d 991, 995-97 (8th Cir. 2005) (affirming a 75% substantial assistance downward departure (twelve offense levels), where the defendant's assistance was extraordinary). We believe reasonable proportionality exists here between Pepper's assistance and the downward departure. The district court properly identified only assistance-related factors and noted, although Pepper's assistance was "pedestrian or average," it was timely, truthful, honest, helpful, and important. The district court considered the § 5K1.1 factors, including the government's recommendation, but felt Pepper's assistance was worth more than the recommended 15% downward departure. The district court found, under Eighth Circuit precedent, Pepper's

assistance merited "something less than a 50 percent reduction" and determined a 40% reduction was warranted. Although we believe it is a close call, we cannot say the district court abused its discretion by the extent of the § 5K1.1 departure.

B. Downward Variance

The government next argues the district court abused its discretion in granting a 59% variance. "We review a district court's interpretation and application of the guidelines **de novo**, its factual findings for clear error, and any decision to depart from the appropriate guidelines range for abuse of discretion." *United States v. Judon*, 472 F.3d 575, 583 (8th Cir. 2007). A district court's decision to vary from the advisory sentencing Guidelines range is reviewed for reasonableness, which is a similar standard to the abuse of discretion standard. *Id.* "A sentencing court abuses its discretion if its [sic] fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but commits a clear error of judgment in weighing those factors." *United States v. Long Soldier*, 431 F.3d 1120, 1123 (8th Cir. 2005).

The district court's § 5K1.1 downward departure brought the bottom of the Guidelines range to 58 months. Thereafter, the district court stated, "I am going to do a variance down to 24 months" and noted

the significance of varying from 58 months to 24 months.

In considering evidence in the record to support the variance, the district court first mentioned Pepper had "no history of violence." The district court tried to distinguish Pepper's lack of violent history from Pepper's lack of a criminal history, stating "you could have a history of violence in your record . . . and have a criminal history or not have a criminal history." This vague distinction is unpersuasive. The district court did not substantiate what it meant by "no history of violence." Indeed, if Pepper had a violent *criminal* history, he would have been ineligible for safety-valve relief, subject to the 120-month statutory mandatory minimum, and the possibility of an enhancement or an upward departure. To the extent the district court considered the absence of violence in Pepper's life generally, we have previously held "[t]he absence of grounds that justify further punishment is not a ground for a downward variance." *United States v. Feemster*, 483 F.3d 583, 2007 U.S. App. LEXIS 9367, 2007 WL 1201885, at *5 (8th Cir. Apr. 25, 2007). The district court's failure to distinguish Pepper's lack of violent history leads us to the inescapable conclusion the district court impermissibly double counted by considering as a § 3553(a) factor Pepper's already accounted for lack of criminal history. *See United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir.) (concluding an extraordinary downward variance of 60% (seven offense levels), was not supported by defendant's lack of criminal history, which already

had been accounted for by defendant's safety-valve relief and criminal history category I), cert. granted, 127 S. Ct. 551, 166 L. Ed. 2d 406 (2006); *see also United States v. Gonzalez-Alvarado*, 477 F.3d 648, 651 (8th Cir. 2007) (noting drastic reductions are discouraged "absent extraordinary circumstances, especially when the sentencing guidelines already significantly reflect the mitigating factors").

The district court next considered unwarranted sentencing disparity among coconspirators:[1] Alexander Blankenship (Blankenship) sentenced to 72 months' imprisonment, Felipe Sandoval (Sandoval) sentenced to 35 months' imprisonment, and Jose Martin Barragan-Torres (Barragan-Torres) sentenced to 90 months' imprisonment. To the extent unwarranted sentencing disparities among co-conspirators and co-defendants are a proper consideration under 18 U.S.C. § 3553(a)(6),[2] *see United States v. Lazenby*, 439 F.3d 928, 934 (8th Cir. 2006) (citing 18 U.S.C. § 3553(a)(6)), it does not justify a downward variance in this case.

---

[1] The district court indicated its consideration of unwarranted sentencing disparity among the co-defendants was not a primary factor in granting a downward variance.

[2] We note "§ 3553(a)(6) may more appropriately apply to disparities on a national level and not within the same conspiracy," but we continue to follow our own precedent. *United States v. Kane*, 470 F.3d 1277, 1281 (8th Cir. 2006) (citing *United States v. Parker*, 462 F.3d 273, 277 (3d Cir.) (concluding "Congress's primary goal in enacting § 3553(a)(6) was to promote national uniformity in sentencing rather than uniformity among co-defendants in the same case"), cert. denied, 127 S. Ct. 462, 166 L. Ed. 2d 329 (2006)).

The district court never mentioned the disparity to be avoided, the relative culpability of the co-defendants, the extent of any co-defendant's assistance, the co-defendants' reductions, or whether Pepper was similarly situated to the co-defendants. Furthermore, the district court did not discuss co-defendant Barragan-Torres, who was sentenced to 90 months' imprisonment, which is 66 months or 73% *greater* than Pepper's sentence. The district court did not adequately explain and support its rationale for sentencing Pepper to 24 months' imprisonment in contrast to Pepper's co-defendants, who received 72, 35, and 90 months' imprisonment.

Finally, the district court questioned Pepper regarding his post-sentence conduct. Pepper testified about his community college attendance, work record, sobriety, and compliance with the other conditions of his supervised release. In granting the downward variance the district court acknowledged, "I don't know whether or not it's appropriate to consider the release – the year he's been out now, almost a year, how well he's done." Nonetheless, the district court concluded, "I'm not going to be disingenuous and say that I haven't considered [Pepper]'s post-release conduct because I have considered it. Exactly how much weight I'm giving it, I don't know exactly."

Our court recently considered the relevance of post-sentence rehabilitation, *see United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007) (citing *United States v. Sims*, 174 F.3d 911, 913 (8th Cir. 1999)), and held "evidence of [defendant]'s post-sentencing

rehabilitation is not relevant and will not be permitted at resentencing because the district court could not have considered that evidence at the time of the original sentencing." The practice of allowing consideration of post-sentencing rehabilitation upon resentencing would create unwarranted sentencing disparities and inject blatant inequities into the sentencing process. Pepper's post-sentencing rehabilitation was an impermissible factor to consider in granting a downward variance.

The lack of clarity regarding the extent to which the district court relied on any one factor notwithstanding, we conclude the district court abused its discretion in granting the downward variance. The district court failed to balance the other factors in § 3553(a), such as the need to impose a sentence reflecting the seriousness of Pepper's offense, which involved between 1,500 and 5,000 grams of methamphetamine mixture and ten to fifteen people, or how, in this case, a sentence of 24 months would promote respect for the law. The district court impermissibly considered Pepper's post-sentence rehabilitation, and further erred by considering Pepper's lack of violent history, which history had already been accounted for in the sentencing Guidelines calculation, and by considering sentencing disparity among Pepper's co-defendants without adequate foundation and explanation.

III. CONCLUSION

For the reasons stated, we reverse and remand this case for resentencing consistent with this opinion. The district court expressed a reluctance to resentence Pepper again should this case be remanded. Thus, we remand Pepper's case for re-sentencing by a different judge, pursuant to our authority under 28 U.S.C. § 2106. *See United States v. Rogers,* 448 F.3d 1033, 1035 (8th Cir. 2006) (per curiam) (citing *Liteky v. United States,* 510 U.S. 540, 554, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (discussing the authority to assign a case to a different judge on remand comes from "the appellate courts' statutory power to 'require such further proceedings to be had as may be just under the circumstances'" (quoting 28 U.S.C. § 2106))). The chief judge of the district court shall reassign this case, in the ordinary course, for resentencing by another judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JASON PEPPER, Defendant.	No. 03-CR-4113-LRR **ORDER** (Filed Jun. 27, 2007)

The matter before the court is the second resentencing of Defendant Jason Pepper, in light of the Eighth Circuit Court of Appeals's opinion in *United States v. Pepper*, 486 F.3d 408 (8th Cir. 2007) ("*Pepper II*"). On June 11, 2007, the court received the mandate in *Pepper II*.

Pursuant to Federal Rule of Criminal Procedure 32, the second resentencing hearing is set before the undersigned at 10 a.m. on July 27, 2007, in the First Floor Courtroom, United States Courthouse and Federal Building, Sioux City, Iowa. One hour has been reserved for this hearing. Counsel are directed to abide by the following instructions:

At least **fourteen calendar days** prior to the hearing, the parties shall file the following with the Clerk and serve a copy on opposing counsel *and* the **United States Probation Office**: a list of (1) all witnesses that counsel expect to call to testify at the

sentencing hearing; (2) all exhibits that counsel expect to offer at the sentencing hearing; and (3) all sentencing issues that counsel will ask the Court to decide, with a separate brief that contains citation to all statutes, case law and advisory Sentencing Guidelines sections relied on in support of counsel's position. The parties are directed to address the legal issue of the scope of the remand from *Pepper II*.

At least **fourteen calendar days** prior to the hearing, counsel shall also exchange exhibits marked with exhibit numbers in accordance with Local Rule 83.7. In the event that counsel expect to offer the testimony of in-custody witnesses, counsel shall provide a minimum of **twenty-one calendar days** notice to the United States Marshal. In the event counsel want the United States Marshal to serve subpoenas on witnesses, those subpoenas shall be delivered to the United States Marshal at least **twenty-one calendar days** in advance of the hearing date.

If a party does not file its sentencing memorandum in a timely manner or if a brief citing to legal authority is not filed, the court shall consider the issues previously raised by the party to be waived.

IT IS SO ORDERED.

DATED this 27th day of June, 2007.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE,
U.S. DISTRICT COURT
NORTHERN DISTRICT
OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. CR03-4113-LRR
vs.	)	
JASON PEPPER,	)	
Defendant.	)	

GOVERNMENT'S SENTENCING MEMORANDUM

COMES NOW, the United States of America and hereby files its sentencing memorandum in this case.

I. SENTENCING ISSUES

(A) Departure for Substantial Assistance

The defendant provided substantial assistance to the government and the United States will make a 5K1.1 substantial assistance motion.

The Court of Appeals determined that (although a close call) the District Court did not abuse its discretion in awarding a 40% substantial assistance departure. *United States v. Pepper*, 486 F.3d 408, 411 (8th Cir. 2007). The Court said "We believe reasonable proportionality exists here between Pepper's assistance and the downward departure." *Id.*

In the time between defendant's last sentencing hearing and now, defendant has provided some additional assistance. The specifics of his assistance will be explained to the District Court at sentencing. The United States does not believe that the additional assistance merits a departure beyond the 40% awarded at the last sentencing hearing.

(B) Variance from Guidelines

Based on conversations with defense counsel, the United States anticipates that defendant will again request a variance from the sentencing guidelines. It appears from Pepper that a variance is foreclosed, at least on the grounds previously described by the District Court.

The Court of Appeals held defendant's lack of violent history to be an inappropriate ground for variance in that case. *Id.* at 412. The Court of Appeals also held that disparity between sentences of co-defendants did not support a downward variance. *Id.*

The District Court is also prohibited from considering post-sentencing rehabilitation. "The practice of allowing consideration of post-sentencing rehabilitation upon resentencing would create unwarranted sentencing disparities and inject blatant inequities into the sentencing process." *Id.*

As to any other grounds for variance, if they were not raised at the previous sentencing or in the opinion from the Court of Appeals, they may not be

considered. *See* 18 U.S.C. § 3742(g). Without the benefit of defendant's brief, the United States is unable to address the issue more fully.

Respectfully submitted,

MATT M. DUMMERMUTH
United States Attorney

By: s/ John Lammers

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[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. CR03-4113-LRR
vs.	)	
JASON PEPPER,	)	
Defendant.	)	

GOVERNMENT'S SENTENCING NOTICE

COMES NOW, the United States of America and hereby files its Notice regarding sentencing issues/ matters pursuant to the court's order.

I. Government's witnesses:

None

II. Government's exhibits:

None

III. Sentencing issues:

A. Departure for Substantial Assistance

B. Variance from Guidelines

Respectfully submitted,

MATT M. DUMMERMUTH
United States Attorney

By: s/ John Lammers

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JASON PEPPER, Defendant.	No. CR 03-4113-4-MWB BRIEF RE: SECOND RESENTENCING

The Defendant, by and through his attorney, Patrick T. Parry, hereby submits the following brief in relation to the second resentencing scheduled for July 27, 2007.

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I. FACTS

The Defendant, Jason Pepper, is before the Court for the second re-sentencing pursuant to a remand from

the Eighth Circuit in *U.S. v. Pepper,* 486 F.3d 408 (8th Cir. 2007). The Defendant was originally sentenced on April 22, 2004, on one count of conspiracy to distribute 500 grams or more of methamphetamine. On appeal, the Circuit Court found that the District Court erred in reducing the Defendant's guideline sentence under U.S.S.G. § 5K1.1 to 24 months imprisonment because the reduction was based, at least in part, on considerations unrelated to substantial assistance. The Eighth Circuit remanded this case for re-sentencing "in accordance with this opinion and the principals set forth by the Supreme Court in Booker. *U.S. v. Pepper,* 412 F.3d 995 (8th Cir. 2005). On the first remand, the district court resentenced the Defendant to the same 24-month sentence, granting Defendant a 40% departure based on his substantial assistance and an additional 59% based upon the Defendant's limited criminal history, the Defendant's post-sentencing rehabilitation, lack of violence, lack of risk to the community and disparity among sentences of co-defendants. Defendant was again sentenced to 24 months' imprisonment, five years of supervised release, and a $100 special assessment. The Court of Appeals found that the 40% substantial assistance reduction was not an abuse of discretion, but found that the Court had "impermissibly considered Pepper's post-offense rehabilitation . . . and by considering sentencing disparity among Pepper's co-defendants without adequate foundation and explanation." *U.S. v. Pepper,* 486 F.3d 408, 413 (8th Cir. 2007).

Subsequent to that decision, Jason Pepper has provided additional substantial assistance by debriefing and doing grand jury. It is anticipated that the government will inform the Court of the additional assistance provided by the Defendant. It is also anticipated that probation can provide more detail regarding the sentences of co-defendants and probation officer Chad Zach's report dated March 8, 2006. (Previously admitted Court Exhibit 1).

II. ISSUES

1. Additional Substantial Assistance.

As noted the Defendant's substantial assistance reduction of 40% was approved by the Court of Appeals. However, Jason Pepper has continued to provide additional substantial assistance including grand jury and debriefing. Since this additional assistance has taken place prior to this second resentencing, the government is not filing a rule 35 motion for further reduction in sentence. However, it is anticipated that the government will describe the extent and nature of this additional assistance. The Defendant asserts that the Court can consider this additional assistance and grant a greater reduction than the 40% already approved by the Eighth Circuit. The undersigned attorney was unable to find any caselaw to support this position, but it would seem clear that the Court should be able to consider this additional assistance in determining whether the Defendant should receive a substantial assistance reduction of greater than the

approved 40%, since this additional assitance [sic] could probably not be considered in a subsequent Rule 35 motion since it occurred prior to the second resentencing.

2. The Defendant's personal characteristics and sentencing disparities can be considered by the Court in determining an appropriate variance

Although the Eighth Circuit determined that the Court should not have granted a variance, that determination seemed to be based upon the Court's use of post-offense rehabilitation, lack of violent criminal history and sentencing disparities without sufficient foundation and explanation. *U.S. v. Pepper,* 486 F.3d 408, 413 (8th Cir. 2007). The Court of Appeals was silent was [sic] to whether any 3553(a) variance could have been appropriate with greater foundation and explanation regarding sentencing disparities if the Court had ignored any post-offense rehabilitation and lack of violent criminal history.

The relevant language of 18 U.S.C. § 3553(a) requires the Court to consider: "(1) the nature and circumstances of the offense and the history and characteristics of the defendant;" and (2) the "need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;(B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other

correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(1),(2). The Court has the authority to determine an [sic] reasonable sentence that differs from the guideline range pursuant to 18 U.S.C. 3553(a). *United States v. Booker,* 160 L. Ed. 2d 621, 125 S. Ct. 738, 756-57 (2005). The Defendant submits that after additional evidence has been presented regarding sentencing disparities and the Defendant's personal characteristics, that the Court can properly consider a variance for Pepper, so long as it excludes consideration of Pepper's lack of violent criminal history and Pepper's post-offense rehabilitation.

III. CONCLUSION

The issues before the Court are: (1) Additional Substantial Assistance by the Defendant; and (2) whether the Court will grant any variance based on 18 U.S.C. § 3553(a).

Respectfully Submitted,

/s/ Patrick T. Parry

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[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JASON PEPPER, Defendant.	No. 03-CR-4113-LRR **ORDER**

The matter before the court is the second resentencing of Defendant Jason Pepper, in light of the Eighth Circuit Court of Appeals's opinion in *United States v. Pepper*, 486 F.3d 408 (8th Cir. 2007) ("*Pepper II*"). On June 27, 2007, the court ordered each party to file a sentencing memorandum. The court specifically ordered the parties to address the legal issue of the scope of the remand from *Pepper II*.

The court has received the parties' sentencing memoranda. Neither party complied with the court's order to address the scope of the remand from *Pepper II*. Therefore, the court orders the parties to submit supplemental sentencing memoranda on the issue of the scope of the remand from *Pepper II* **on or before July 17, 2007.** If a party does not file its supplemental sentencing memorandum in a timely manner or if a brief citing to legal authority is not filed, the

court shall consider the issues previously raised by the party to be waived.

IT IS SO ORDERED.

DATED this 13th day of July, 2007.

/s/ Linda R. Reade
LINDA R. READE
CHIEF JUDGE,
U.S. DISTRICT COURT
NORTHERN DISTRICT
OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JASON PEPPER Defendant.	No. CR 03-4113-4-MWB SUPPLEMENTAL BRIEF RE: SECOND RESENTENCING SCOPE OF REMAND

The Defendant, by and through his attorney, Patrick T. Parry, hereby submits the following supplemental brief in relation to the second resentencing scheduled for July 27, 2007. This brief is filed as a supplemental brief pursuant to Court order dated July 13, 2007, which ordered the parties to address the scope of remand from *U.S. v. Pepper,* 486 F.3d 408 (8th Cir. 2007) (*Pepper II*).

I. SCOPE OF REMAND-BACKGROUND

The Defendant, Jason Pepper, is before the Court for the second re-sentencing pursuant to a remand from the Eighth Circuit in *U.S. v. Pepper,* 486 F.3d 408 (8th Cir. 2007) (*Pepper II*). The issues raised on the second appeal were: (1) the government asserted the district court abused its discretion by granting a 40% downward departure for substantial assistance; and (2) the government argued the district court

abused its discretion in granting a 59% variance. *Pepper II*. The Court of Appeals determined that the 40% substantial assistance reduction was not an abuse of discretion, but found that the Court had "impermissibly considered Pepper's post-offense rehabilitation . . . and by considering sentencing disparity among Pepper's co-defendants without adequate foundation and explanation." *Pepper II* at 413. Subsequent to that decision, Jason Pepper has provided additional substantial assistance by debriefing and doing grand jury.

II. SCOPE OF REMAND-LAW

The Eighth Circuit recently addressed the scope of remand issue in *United States v. Kendall,* 475 F.3d 961 (8th Cir 2007), stating:

> "In federal sentencing, more than one appeal is sometimes required." *United States v. Santonelli,* 128 F.3d 1233, 1238 (8th Cir. 1997). "Repetitive hearings, followed by additional appeals, [however] waste judicial resources and place additional burdens on parole officers and personnel and on hard-working district and appellate judges." *Id.* Specific remands should be used to eliminate the need for additional appeals and to "avoid giving the parties additional bites of the litigation apple." *Id.* at 1238-39. Accordingly, we may remand for resentencing "with instructions to resentence the defendant on the existing record." *United States v. Dunlap,* 452 F.3d 747, 749 (8th Cir. 2006) (citing

> *United States v. Poor Bear,* 359 F.3d 1038, 1043-44 (8th Cir. 2004)).
>
> Conversely, we may choose to remand "without placing any limitations on the district court [in which case it] 'can hear any relevant evidence . . . that it could have heard at the first hearing.'" *Id.* at 749-50 (quoting *United States v. Cornelius,* 968 F.2d 703, 705 (8th Cir. 1992). Ultimately, the scope of a remand must be determined by reference to the analysis contained in the opinion. *Santonelli,* 128 F.3d at 1237. "On remand for resentencing, all issues decided by the appellate court become the law of the case, and the sentencing court is bound to proceed within the scope of any limitations imposed . . . by the appellate court." *United States v. Curtis,* 336 F.3d 666, 669 (8th Cir. 2003).

United States v. Kendall, 475 F.3d 961, 963-964 (8th Cir 2007). The entire opinion of the appellate decision needs to be reviewed to determine the scope of remand, rather than just the final language or directives contained within the opinion. *United States v. Santonelli,* 128 F.3d 1233 (8th Cir. 1997).

III. SCOPE OF REMAND-ISSUES

A. SUBSTANTIAL ASSISTANCE

In *Pepper II,* the Court was clear that it had reviewed and determined that the 40% reduction for substantial assistance was not an abuse of discretion. Therefore, on remand, the government cannot again

assert that the Court should consider a lesser substantial assistance reduction since this issue has already been decided on appeal. Consideration of this issue would give the government an "additional bite of the litigation apple," and should be avoided. *Santonelli* at 1238-1239. However, as mentioned, Jason Pepper has provided additional substantial assistance since the time of the last resentencing. This additional substantial assistance consists of debriefing and doing grand jury. This additional information can be considered by the Court at the time of the second resentencing, but only in the context of whether the Court will increase the substantial assistance reduction beyond the original 40% reduction, and not as a means for reconsideration of the already approved 40% reduction for substantial assistance. This additional information can be considered, since it could have been considered at the original hearing if it had existed, but the Court can only consider it in the framework of this remand where the 40% for the previous substantial assistance has already been determined as the law of the case. "On remand for resentencing, a district court can hear any relevant evidence that it could have heard at the first hearing, but all issues decided by the appellate court become the law of the case." *United States v. Behler,* 187 F.3d 772, 777 (8th Cir. 1999).

B. VARIANCE FROM THE GUIDELINES

In *Pepper II,* the Eighth Circuit determined that the district court should not have granted a variance

based upon the Court's use of: (1) post-offense rehabilitation; (2) lack of violent criminal history; and (3) sentencing disparities without sufficient foundation and explanation. *Pepper II* at 412-413. The Court of Appeals was silent was to whether any 3553(a) variance could have been appropriate if the first two factors (post-offense rehabilitation and lack of violent criminal history) were disregarded and further evidence was presented regarding sentencing disparities. Since evidence that relates to a variance under 18 U.S.C. § 3553(a) could have been considered at the original sentencing, and the Eighth Circuit Court did not foreclose any variance, then the issue of a variance can be considered within the framework that post-offense rehabilitation and lack of violent criminal history must not be considered and sentencing disparities can only be considered if additional foundation and explanation is presented. *See United States v. Behler*, 187 F.3d 772, 777 (8th Cir. 1999) (evidence on remand allowed at first hearing can be considered except that issues previously decided on appeal cannot be reconsidered.) Therefore, any evidence that is presented within this framework can be considered on remand as no limit on evidence was ordered by the Court in *Pepper II*. *See United States v. Kendall*, 475 F.3d 961, 963-964 (8th Cir 2007) (Court can order that resentencing on remand consider only existing record **or** can order that relevant evidence be considered within the scope of limitation imposed by the appellate court.)

IV. CONCLUSION

The issues that can be considered by the Court within the scope on remand from *Pepper II* are: (1) Whether the Defendant should get a substantial assistance reduction of greater than 40% based on additional assistance; and (2) whether the Court will grant any variance based on 18 U.S.C. § 3553(a) within the framework as set forth in *Pepper II*.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. CR03-4113-LRR
vs.	)	
JASON PEPPER,	)	
Defendant.	)	

GOVERNMENT'S SUPPLEMENTAL SENTENCING MEMORANDUM

The United States of America hereby files its supplemental sentencing memorandum in this case, specifically addressing the issue of the scope of the Court's authority on remand from the second appeal in this case.

SCOPE OF REMAND

I. Departure for Substantial Assistance

The first inquiry regarding the legal issue of the scope of the remand is the first issue addressed in the opinion – whether the Court on resentencing is bound by the 40% substantial assistance departure granted at the last sentencing hearing, a departure which was not overruled by the 8th Circuit Court of Appeals. The Court of Appeals determined that (although "a close call") the district court did not abuse its

discretion in awarding a 40% substantial assistance departure. *United States v. Pepper*, 486 F.3d 408, 411 (8th Cir. 2007) (*Pepper II*). The appellate court found that "reasonable proportionality exists here between Pepper's assistance and the downward departure," so the court could not "say the district court abused its discretion by the extent of the § 5K1.1 departure." *Id.*

It did not explicitly hold, however, that a different degree of departure would have been unreasonable, or that any other departure would have amounted to an abuse of discretion. Notably, the Court did not affirm the sentence in part (regarding departure) and reverse in part (regarding variance), but simply stated, "we reverse and remand this case for resentencing consistent with this opinion." *Id.* at 412. It appears that the appellate court was providing guidance about what it considered a "closely called" reasonable departure in these circumstances, but was not explicitly mandating that the same departure be granted on remand.

On remand, sentencing is de novo barring "any limitations imposed on [the district court's] functions at resentencing by the appellate court." *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992). In this case, it appears that the Court of Appeals placed no explicit limitations on the district court with regard to the substantial assistance departure, other than to preclude an argument that a 40% departure is unreasonable.

II. Defendant's Further Assistance

In its initial sentencing memorandum, the government advised the Court of the following:

> In the time between defendant's last sentencing hearing and now, defendant has provided some additional assistance. The specifics of his assistance will be explained to the District Court at sentencing. The United States does not believe that the additional assistance merits a departure beyond the 40% awarded at the last sentencing hearing.

Upon further review, the government believes that the issue of additional assistance is not properly before the court on remand. It was not a fact available at the original sentencing, so may not be considered. *See United States v. Sims,* 174 F.3d 911, 913 (8th Cir. 1999). If there is to be any recognition of additional cooperation, it should be through a Rule 35 motion, should the government exercise its discretion and make such a motion. The matter of the additional post-sentencing cooperation is not properly before the court in this resentencing hearing.

III. Prospect of Variance from Guidelines

As in any sentencing, we believe the court should conduct the three-step procedure approved by the Court of Appeals in sentencing this defendant.

> First, the district court should determine the Guidelines sentencing range. Second, the district court should determine whether

> any traditional departures are appropriate. Third, the district court should apply all other section 3553(a) factors in determining whether to impose a Guidelines or non-Guidelines sentence.

United States v. Mosqueda-Estevez, 485 F.3d 1009, 1012 (8th Cir. 2007). The third and final step, determining whether to impose a guidelines or non-guidelines sentence, is the final issue regarding the scope of the remand here.

The initial advisory guideline range is not disputed. Defendant's advisory guideline range is 97-121 months. After the Court decides the appropriate extent of the substantial assistance departure, it should consider 18 U.S.C. § 3553(a) and impose a reasonable sentence. The identified guideline range is simply an advisory point of reference, and the ultimate sentence may be higher or lower than the advisory guideline range.

Based on the language used by the Court in *Pepper II,* we believe downward variance should be considered foreclosed on the three § 3553(a) factors considered by the district court at the previous sentencing. In *Pepper II* the Court stated:

> The lack of clarity regarding the extent to which the district court relied on any one factor notwithstanding, we conclude the district court abused its discretion in granting the downward variance. The district court failed to balance the other factors in § 3553(a), such as the need to impose a

> sentence reflecting the seriousness of Pepper's offense, which involved between 1500 and 5000 grams of methamphetamine mixture and ten to fifteen people, or how, in this case a sentence of 24 months would promote respect for the law.

486 F.3d at 413. It appears that the appellate court rejected downward variance on the specific grounds discussed in the opinion – lack of violent history, post-sentencing rehabilitation, and disparate sentences between co-defendants. The Court held defendant's lack of violent history to be an inappropriate ground for variance in this case. *Id.* at 412. It also held that disparity between sentences of co-defendants did not support a downward variance. *Id.* Further, the district court is prohibited at resentencing from considering post-sentencing rehabilitation. "The practice of allowing consideration of post-sentencing rehabilitation upon resentencing would create unwarranted sentencing disparities and inject blatant inequities into the sentencing process." *Id.*

It appears from the undersigned's review of *Pepper II* that the scope of remand is de novo regarding the substantial assistance departure. It further appears that downward variance should not be granted here based on lack of violent history, disparity between co-defendants' sentences, and post-sentencing rehabilitation.

Respectfully submitted,

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By: s/ John Lammers

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UNITED STATES OF AMERICA, Plaintiff, vs. JASON PEPPER, Defendant.

No. 03-CR-4113-LRR

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION

2007 U.S. Dist. LEXIS 52154

July 18, 2007, Decided
July 18, 2007, Filed

COUNSEL: For Jose Martin Barragan-Torres (1), Interpreter, Defendant: Robert L Sikma, LEAD ATTORNEY, Sioux City, IA.

For Alexander Blankenship (2), Defendant: Robert Tiefenthaler, LEAD ATTORNEY, Sioux City, IA.

For Felipe Sandoval (3), Defendant: Pamela A Wingert, LEAD ATTORNEY, Spirit Lake, IA.

For Jason Pepper (4), Defendant: Patrick Thomas Parry, LEAD ATTORNEY, Forker & Parry, Sioux City, IA.

For USA, Plaintiff: John H Lammers, LEAD ATTORNEY, US Attorney's Office, Sioux City, IA.

JUDGES: LINDA R. READE, CHIEF JUDGE.

OPINION BY: LINDA R. READE

OPINION

ORDER

I. INTRODUCTION

The matter before the court is the second resentencing of Defendant Jason Pepper, in light of *United States v. Pepper*, 486 F.3d 408 (8th Cir. 2007) ("*Pepper II*").

II. BACKGROUND

On July 17, 2007, the parties filed sentencing memoranda on the legal issue of the scope of the remand from *Pepper II*. The parties' memoranda reveal two sub-issues: (1) whether the court is required to grant Defendant a 40% reduction in his advisory Sentencing Guidelines range, pursuant to USSG §5K1.1; and (2) whether the court may consider any additional assistance that Defendant provided after the first resentencing hearing. The second resentencing hearing is scheduled for July 27, 2007.

III. ANALYSIS

A. First Resentencing Hearing and Pepper II

Defendant pled guilty to conspiracy to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846. It is undisputed that Defendant's total offense level is **30**, he is a **Criminal History Category I** and his

pre-departure advisory Guidelines Range is **97 to 121 months of imprisonment**.

At the first resentencing hearing, the government made a motion pursuant to USSG §5K1.1, and a district court judge granted the motion and reduced Defendant's sentence by 40%. This reduced the bottom of Defendant's advisory Sentencing Guidelines range to 58 months of imprisonment. After considering the factors at 18 U.S.C. § 3553(a), the judge varied downward an additional 59% and imposed a sentence of 24 months of imprisonment.

On appeal from the first resentencing hearing, the Eighth Circuit Court of Appeals discussed both the departure and the variance. With respect to the departure, the Eighth Circuit Court of Appeals stated: "Although we believe it is a close call, we cannot say the district court abused its discretion by the extent of the §5K1.1 departure." *Pepper II*, 486 F.3d at 411. With respect to the variance, the court stated:

> [W]e conclude the district court abused its discretion in granting the downward variance. The district court failed to balance the other factors in § 3553(a), such as the need to impose a sentence reflecting the seriousness of [Defendant's] offense, which involved between 1,500 and 5,000 grams of methamphetamine mixture and ten to fifteen people, or how, in this case, a sentence of 24 months would promote respect for the law. The district court impermissibly considered

> [Defendant's] post-sentence rehabilitation, and further erred by considering [Defendant's] lack of violent history, which history had already been accounted for in the [advisory S]entencing Guidelines calculation, and by considering sentencing disparity among [Defendant's] co-defendants without adequate foundation and explanation.

Id. at 413. In sum, the court concluded: "For the reasons stated, we reverse and remand this case for resentencing consistent with this opinion." *Id.* The court then ordered another judge to preside over the second resentencing hearing.

B. Arguments

In his sentencing memorandum, Defendant argues that, because the Eighth Circuit Court of Appeals indicated that a 40% reduction for substantial assistance was not an abuse of discretion, the court is bound impose the same reduction on remand. At the same time, however, Defendant claims that the court should consider additional substantial assistance that he provided after the first resentencing hearing and potentially depart more than 40%.

In its sentencing memorandum, the government argues that the court is not bound to depart downward by 40%, because the Eighth Circuit Court of Appeals reversed Defendant's sentence and did not specifically direct the court to impose such a reduction on remand. Further, the government argues that the issue of any additional assistance should not be

litigated in the second resentencing hearing, because it was not a fact available to the court at the original sentencing.

C. Law

The Eighth Circuit Court of Appeals recently addressed the scope of a remand after an appeal results in a reversal of a defendant's sentence. The Eighth Circuit Court of Appeals observed:

> "In federal sentencing, more than one appeal is sometimes required." *United States v. Santonelli*, 128 F.3d 1233, 1238 (8th Cir. 1997). "Repetitive hearings, followed by additional appeals, [however] waste judicial resources and place additional burdens on parole officers and personnel and on hard-working district and appellate judges." *Id.* Specific remands should be used to eliminate the need for additional appeals and to "avoid giving the parties additional bites of the litigation apple." *Id.* at 1238-39. Accordingly, we may remand for resentencing "with instructions to resentence the defendant on the existing record." *United States v. Dunlap*, 452 F.3d 747, 749 (8th Cir. 2006) (citing *United States v. Poor Bear*, 359 F.3d 1038, 1043-44 (8th Cir. 2004)).
>
> Conversely, we may choose to remand "without placing any limitations on the district court [in which case it] 'can hear any relevant evidence . . . that it could have heard at the first hearing.'" *Id.* at 749-50

> (quoting *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992) (internal citations and parenthetical omitted)). Ultimately, the scope of a remand must be determined by reference to the analysis contained in the opinion. *Santonelli*, 128 F.3d at 1237. "On remand for resentencing, all issues decided by the appellate court become the law of the case, and the sentencing court is bound to proceed within the scope of any limitations imposed . . . by the appellate court." *United States v. Curtis*, 336 F.3d 666, 669 (8th Cir. 2003) (internal quotations and citations omitted).

United States v. Kendall, 475 F.3d 961, 963-64 (8th Cir.), *cert. denied*, 127 S. Ct. 2954, 168 L. Ed. 2d 278 (2007).

D. Application

In this case, the Eighth Circuit Court of Appeals reversed Defendant's sentence and remanded for a new sentencing hearing. The only specific restrictions on the court's decision on remand were (1) the second resentencing hearing should take place before a different judge and (2) such judge's decision should be "consistent with [*Pepper II*]." The fighting issues before the court, then, are whether it is consistent with *Pepper II* to (1) consider the propriety and extent of a USSG §5K1.1 downward departure de novo and (2) consider any substantial assistance that Defendant provided after the first resentencing hearing.

It is not inconsistent with *Pepper II* to consider the propriety and extent of a USSG §5K1.1 downward departure de novo. In *Pepper II*, the Eighth Circuit Court of Appeals simply indicated that a 40% downward departure was not an abuse of discretion and that a 59% downward variance for the particular reasons stated at the first resentencing hearing was an abuse of discretion. These two conclusions are the law of the case. That said, the court does not construe *Pepper II* to hold that a 40% downward departure is the only reasonable outcome for Defendant or that the court must impose a 40% downward departure on remand pursuant to USSG §5K1.1. If the Eighth Circuit Court of Appeals had wanted to narrow the scope of the remand in such a fashion, it would have so stated. *See United States v. Maldonado*, 242 F.3d 1, 4 (1st Cir. 2001) ("[I]t is hard to find an appeals court forbidding de novo resentencing, unless the mandate has affirmatively restricted the remand.").

Pepper II was very carefully written. Instead of affirming and reversing in part, the Eighth Circuit Court of Appeals reversed and remanded. *Cf. Cornelius*, 968 F.2d at 706 (discussing remand after appeal and holding that on remand the district court correctly held that an issue decided in the appeal was the law of the case, where the appellate court had expressly affirmed in part on that issue in the appeal). Further, the Eighth Circuit Court of Appeals did not make any specific instructions to the court on the USSG § 5K1.1 issue; for example, the Eighth Circuit Court of Appeals did not instruct the court to

begin the second sentencing hearing at the third-step of the familiar three-step process enunciated in *United States v. Haack*, 403 F.3d 997, 1002 (8th Cir.), *cert. denied*, 546 U.S. 913, 126 S. Ct. 276, 163 L. Ed. 2d 246 (2005).

It would, however, be plainly inconsistent with governing precedent and *Pepper II* to consider any substantial assistance Defendant may have provided authorities after his first resentencing hearing in fashioning his sentence at the second resentencing hearing. It is settled that, after reversal, "the district court can hear any relevant evidence . . . that *it could have heard at the first hearing.*" *Cornelius*, 968 F.2d at 705 (emphasis added). In *Pepper II*, the Eighth Circuit Court of Appeals applied this very same principle and held that the district court erred in considering post-sentencing rehabilitation at Defendant's first resentencing, "'because the court could not have considered that evidence at the time of the original sentencing.'" *Pepper II*, 486 F.3d at 413 (quoting *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007)). Because the court obviously could not have considered any substantial assistance that Defendant provided after the first resentencing hearing at the original sentencing, the court may not consider it at the second resentencing hearing. Federal Rule of Criminal Procedure 35 is the proper vehicle for any reduction for such assistance. *See United States v. Johnson*, 241 F.3d 1049, 1054 (8th Cir. 2001) ("A defendant who receives a departure for substantial assistance rendered before sentencing is not

precluded from providing post-sentencing substantial assistance in exchange for a Rule 35(b) motion.").

IV. CONCLUSION

At the second resentencing hearing, the court shall sentence Defendant in a manner consistent with the instant Order. The court will not consider itself bound to reduce Defendant's advisory Sentencing Guidelines range by 40%, pursuant to USSG §5K1.1. Further, in fashioning Defendant's sentence, the court will not consider any additional assistance that Defendant may have provided after his first resentencing hearing.

IT IS SO ORDERED.

DATED this 18th day of July, 2007.

LINDA R. READE

CHIEF JUDGE, U.S. DISTRICT COURT

NORTHERN DISTRICT OF IOWA

Supreme Court of the United States

No.

07-6046

JASON PEPPER,

Petitioner

v.

UNITED STATES

(Filed Feb. 12, 2008)

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Gall v. United States*, 552 U.S. ___ (2007).

January 7, 2008

United States of America, Appellant,
v. Jason Pepper, Appellee.

No. 06-2453

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

518 F.3d 949; 2008 U.S. App. LEXIS 5156

February 15, 2008, Submitted
March 11, 2008, Filed

COUNSEL: For United States of America, Plaintiff-Appellant: John H. Lammers, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Northern District of Iowa, Sioux City, IA.

For Jason Pepper, Defendant-Appellee: Patrick Thomas Parry, FORKER & PARRY, Sioux City, IA.

Jason Pepper, Defendant-Appellee, Pro se, Sioux City, IA.

JUDGES: Before RILEY, BOWMAN, and ARNOLD, Circuit Judges.

OPINION BY: RILEY

OPINION

RILEY, Circuit Judge.

This case is before us for the third time. In *United States v. Pepper*, 412 F.3d 995, 999 (8th Cir. 2005) (*Pepper I*), we held the district court erred by granting a 75% downward departure for Jason Pepper's (*Pepper*) substantial assistance and imposing a

sentence of 24 months imprisonment, because the district court erroneously based the extent of the departure on matters unrelated to Pepper's assistance. On remand, the district court granted a 40% downward departure (five offense levels) for substantial assistance, followed by a 59% downward variance (eight offense levels), and again imposed a sentence of 24 months imprisonment. The government appealed.

We reversed and remanded the case for resentencing by a different judge, pursuant to our authority under 28 U.S.C. § 2106. *United States v. Pepper*, 486 F.3d 408, 413 (8th Cir. 2007) (*Pepper II*). Pepper appealed. The Supreme Court vacated our judgment and remanded the case to us for further consideration in light of *Gall v. United States*, 522 U.S., 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). Having carefully considered Gall's impact on Pepper's case, we again reverse the sentence of the district court and remand for resentencing by a different judge.

I. BACKGROUND

From *Pepper II* we know Pepper pled guilty to conspiracy to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. Pepper's total offense level of 30 and criminal history category of I produced an advisory United States Sentencing Guidelines range of 97 to 121 months. Pepper was eligible for safety-valve relief, thus the statutory mandatory minimum sentence of 120 months imprisonment did not apply.

See 18 U.S.C. § 3553(f), U.S.S.G. §§ 2D1.1(b)(6), and 5C1.2. In Pepper's initial sentencing, the government filed a motion for substantial assistance, pursuant to U.S.S.G. § 5K1.1, and recommended a 15% downward departure. The district court departed downward 75% and sentenced Pepper to 24 months imprisonment. We reversed, finding the district court erred by considering factors unrelated to Pepper's assistance in granting the § 5K1.1 downward departure motion, concluding "given the pedestrian nature of Mr. Pepper's assistance, it is far from certain that the court would have arrived at the same guidelines sentence had it considered only assistance-related elements when deciding the extent of the departure." *Pepper II*, 486 F.3d at 410 (quoting *Pepper I*, 412 F.3d at 999).

On remand, the district court found Pepper's assistance merited a 40% § 5K1.1 downward departure, which reduced the bottom of the advisory sentencing Guidelines range to 58 months. Then, under 18 U.S.C. § 3553(a), the district court granted a downward variance of 59%, based on Pepper's post-sentencing rehabilitation, lack of violent history, and, to a lesser degree, on the need to avoid unwarranted sentencing disparity among co-defendants. The district court again imposed a sentence of 24 months imprisonment. *Pepper II,* 486 F.3d at 410. We found the district court did not abuse its discretion by the extent of the § 5K1.1 downward departure. *Id.* at 411. We did find "[t]he district court impermissibly considered Pepper's post-sentence rehabilitation, and further erred by considering Pepper's lack of violent

history, which history had already been accounted for in the sentencing Guidelines calculation, and by considering sentencing disparity among Pepper's co-defendants without adequate foundation and explanation." *Id.* at 413.

II. DISCUSSION

We review all sentences, whether inside or outside the Guidelines range, under a deferential abuse of discretion standard. *Gall*, 128 S. Ct. at 597. Before reaching the substantive reasonableness of the sentence, we "must first ensure that the district court committed no significant procedural error, such as . . . failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." *Id.* Although extraordinary circumstances are not required to justify a sentence outside the Guidelines range, "a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Id.* at 594.

> If [the district court] decides that an outside-Guidelines sentence is warranted, [the district court] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. . . . [A] major departure should be supported by a more significant justification than a minor one.

. . .

> [T]he [appellate] court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.

Id. at 597. An abuse of discretion may occur when a court "gives significant weight to an improper or irrelevant factor." *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005). *See Gall*, 128 S. Ct. at 597. These rules guide our analysis.

The district court erred because, to the extent the district court explained Pepper's sentence at all, the district court predominantly considered improper factors. Put another way, the district court committed procedural error in failing adequately to explain with sufficient justifications the court's conclusion that a 59% variance after the § 5K1.1 downward departure was warranted in this case.

First, the district court considered Pepper had "no history of violence." Although the district court attempted to distinguish Pepper's lack of a violent history from Pepper's lack of a violent criminal history, in *Pepper II* we found this distinction vague and unpersuasive because "[t]he district court did not substantiate what it meant by 'no history of violence.'" *Pepper II*, 486 F.3d at 412. Because the district court did not adequately explain what it meant by "no history of violence," we reached the "inescapable conclusion" the district court improperly "double

counted" Pepper's lack of a violent history in arriving at Pepper's sentence. *Id.* We reasoned:

> [I]f Pepper had a violent *criminal* history, he would have been ineligible for safety-valve relief, subject to the 120-month statutory mandatory minimum, and the possibility of an enhancement or an upward departure. To the extent the district court considered the absence of violence in Pepper's life generally, we have previously held the absence of grounds that justify further punishment is not a ground for a downward variance.

Id. (quotations and citations omitted). Our reasoning in *Pepper II* is consistent with *Gall*. *Gall* requires a district judge to explain adequately and provide sufficient justifications for why an unusually lenient sentence such as Pepper's is appropriate. *Gall*, 128 S. Ct. at 594. The district court in Pepper's case provided insufficient explanation of the "no history of violence" factor.

The district court next considered the desire to avoid unwarranted sentencing disparity among co-conspirators.[1] Pepper's three co-defendants were sentenced to 35, 75, and 90 months imprisonment. As we noted in *Pepper II*, "[t]he district court never mentioned the [unwarranted sentencing] disparity to be avoided, the relative culpability of the co-defendants,

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[1] The district court indicated it was "not giving a lot of weight" to this factor.

the extent of any co-defendant's assistance, the co-defendants' reductions, or whether Pepper was similarly situated to the co-defendants." 486 F.3d at 412. Indeed, considering co-defendant Baragan-Torres' 90 month sentence and co-defendant Blankenship's 72 month sentence, it appears Pepper's 24 month sentence *creates*, rather than avoids, sentencing disparity among co-conspirators. In light of Gall's requirement that sentencing judges adequately explain the chosen sentence, we correctly concluded in *Pepper II* that "[t]he district court did not adequately explain and support its rationale for sentencing Pepper to 24 months' imprisonment in contrast to Pepper's co-defendants[.]" *Id.* at 413.

Finally, and most significantly, the district court apparently gave significant weight to Pepper's post-sentence rehabilitation. As we discussed in *Pepper II*, "'evidence of [a defendant]'s post-sentence rehabilitation is not relevant and will not be permitted at resentencing because the district court could not have considered that evidence at the time of the original sentencing.'" *Id.* (quoting *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007)). *See also United States v. McMannus*, 496 F.3d 846, 852 n.4 (8th Cir. 2007) (noting that "allowing [post-sentence rehabilitation] evidence to influence [a defendant]'s sentence would be grossly unfair to the vast majority of defendants who receive no sentencing-court review of any positive post-sentencing rehabilitative efforts").

At resentencing, Pepper testified extensively, and almost exclusively, about his post-sentencing

rehabilitation, including participation in a drug treatment program while incarcerated, community college attendance, work record, and compliance with the conditions of his supervised release. Pepper's father also testified about Pepper's maturity and sobriety since his release. In addition, a substantial portion of the sentencing memorandum prepared by the United States probation officer discussed Pepper's post-sentence rehabilitation. The district court explicitly adopted as its findings of fact the testimony of Pepper, Pepper's father, and the sentencing memorandum. Although the district court acknowledged it may not be appropriate to consider Pepper's post-sentence conduct, the court nevertheless stated, "I'm not going to be disingenuous and say that I haven't considered [Pepper]'s post-release conduct because I have considered it. Exactly how much weight I'm giving it, I don't know exactly." The record leaves little doubt Pepper's post-release rehabilitation was indeed given significant weight, and possibly overwhelming weight, in imposing the 24 month sentence. *Gall* does not alter our circuit precedent or our conclusion in *Pepper II* that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance.

Because the district court procedurally erred by failing to explain adequately Pepper's sentence and by relying predominantly on improper factors to determine the sentence variance, we need not reach the issue of whether Pepper's sentence was substantively reasonable.

III. CONCLUSION

For the foregoing reasons, we again reverse and remand Pepper's case for resentencing consistent with this opinion. As the district court expressed a reluctance to resentence Pepper again should the case be remanded, we again remand this case for resentencing by a different judge, pursuant to our authority under 28 U.S.C. § 2106. *See United States v. Rogers*, 448 F.3d 1033, 1035 (8th Cir. 2006) (per curiam) (citing *Liteky v. United States*, 510 U.S. 540, 554, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (noting the authority to assign a case to a different judge on remand comes from "the appellate courts' statutory power to 'require such further proceedings to be had as may be just under the circumstances'" (quoting 28 U.S.C. § 2106))). The chief judge of the district court shall reassign this case, in the ordinary course, for resentencing by another judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA WESTERN DIVISTION [sic]

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JASON PEPPER,** **Defendant.**	**Criminal No. 03-4113 LRR** **DEFENDANT'S SECOND RESENTENCING MEMORANDUM** (Filed Oct. 13, 2008)

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I. INTRODUCTION

This is an extraordinary case that warrants an extraordinary sentencing variance. From his arrest

and post-Miranda statement without counsel, to his choice of prison and 500-hour drug treatment program over boot camp, to his choice of college, full-time serious work, marriage and family, Mr. Pepper has exhibited to all that a 24 month sentence and supervised release has satisfied all the requirements of 18 U.S.C. § 3553(a). Any greater sentence would be greater than necessary to comply with the requirements of § 3553(a)(2).

When the second resentencing occurs, Pepper will have been out of prison for nearly three and a half years. He was discharged from Yankton on about March 10, 2005. He was released to a community corrections center in Council Bluffs, and completed his sentence there on June 27, 2005. He has been on supervised release since then, and has exhibited exemplary behavior.

Mr. Pepper is attending school full-time and studying business management at Parkland College in Champaign-Urbana, Illinois. He envisions starting the manager-in-training program at Sam's Club in January 2009, where he is currently employed. He was named associate of the year last year at the Sam's Club in Champaign, and has been working as a night supervisor. Once he completes the manager-in-training program, he will be eligible for hire as an assistant manager, earning $43,000.00 per year.

Mr. Pepper is 29 years old and has been married since May 19, 2007. His wife has a seven-year-old daughter who is in the second grade, and considers

him the only father she has ever known. He is a primary source of family support. His wife also works at Sam's Club in the jewelry department.

At the second resentencing Mr. Pepper should receive the same sentence of 24 months. Pepper believes that (1) his age at the time of the offense, (2) his lack of a criminal record, (3) his lack of a violent history, (4) his drug addiction at the time of the offense, (5) his extra-ordinary and genuine post-offense and sentencing rehabilitation, (6) the need to avoid disparity among co-defendants, (7) the costs of incarceration, (8) his exemplary behavior on supervised release, (9) his continued cooperation, (10) his remorse, (11) his family obligations, and (12) what is just, warrants a variance down to a final sentence of 24 months. These factors are sufficiently compelling to support the degree of variance requested. As Judge Bennett recognized during the first resentencing, while Pepper should not get the benefit of the prior illegal sentence, he should not be penalized for doing extraordinarily well on supervised release. RST 5/05/06, p. at 90.

Each one of the twelve factors listed above can itself support a percentage variance (approximately 5%) to reach the 59% variance from the 58 month sentence to reach a 24 month sentence.

II. BACKGROUND

On October 1, 2003, Jason Pepper (DOB 4/30/79) was arrested and placed in custody for conspiring to

distribute methamphetamine. RST 5/5/06, p. 19.[1] He was 24.

On October 22, 2003, Pepper and three co-defendants were charged with conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), and 21 U.S.C. § 846.

On December 18, 2003, Pepper plead guilty to one count of conspiring to distribute 500 grams or more of a methamphetamine mixture; in his plea agreement, he agreed that he was responsible for distributing between 1.5 and 5 kilograms of a methamphetamine mixture.

On March 10, 2004, Pepper appeared for sentencing. He had been in custody since his arrest October 1, 2003, a little over five months. TS 3/10/04, p. 16.

All parties agreed that Pepper had a Guideline offense level of 30 and a criminal history category 1. Because he was safety valve eligible (and the statutory minimum sentence of ten years did not apply) his Guideline range was 97 to 121 months. *Id.* at 2.

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[1] "RST 5/5/06" references Pepper's resentencing on May 5, 2006, following the Eighth Circuit reversing his sentence in *United States v. Pepper*, 412 F.3d 995, 996, 999 (8th Cir. 2005). "TS 3/10/04" references Pepper's first sentencing on March 10, 2004.

The government filed a substantial assistance motion under Guideline 5K1.1 and requested a 15 percent reduction based on the following: (1) upon Pepper's arrest, he timely provided a post-Miranda statement without counsel, (2) he provided a proffer statement with his counsel present, (3) the government was able to use his information before the grand jury, he was a corroborative witness on one defendant that was his source and was a main witness against a second defendant; both defendants were indicted, (4) he was a witness on a gun count, and (5) he was truthful and reliable. *Id.* at 2, 5, 6-9. Also, he had provided information regarding 10 or 11 people involved in drug activity. *Id.* at 11.

Through counsel (and with no objection by the government), Pepper's background was explained to the judge. *Id.* at 9-12, 22. When Pepper was 19, his brother passed away. When he was 23, his mother passed away. His parents were divorced. He was somewhat homeless when he became involved in the criminal activity. He very much wanted drug treatment. He was glad he was arrested because it got him away from methamphetamine. He had a good academic background and was in the top third of his class. His father was in the courtroom and the judge noted that the father wrote a "very thoughtful letter" and of the thousands of letters the judge had received, it was one of the most thoughtful. In conclusion, counsel requested a departure so Pepper could get into a boot camp program. *Id.* at 12. The United

States Probation Office also recommended boot camp. *Id.*

The judge replied if Pepper was interested in drug treatment, the 500-hour program at the prison in Yankton, South Dakota, was the best, but Pepper would do more prison time in Yankton then at a boot camp.[2] *Id.* at 12-14. Pepper requested that he be sent to Yankton so he could get drug treatment. *Id.* at 15. The government did not object to this request and stood by its initial recommendation. *Id.*

The judge, after placing a call to Yankton, determined he would need to impose at least a 24 month sentence (which would include Pepper's time in custody since October 1, 2003) in order to ensure that Pepper would get drug treatment: anything lower, based on the waiting list, he may not get treatment. *Id.* at 16-17.

The judge then proceeded to sentencing. Based on the substantial assistance motion and the factors under Guideline 5K1.1, the judge granted the motion, committed Pepper to the federal prison camp in Yankton for 24 months, and requested that he be

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[2] The sentencing judge was very experienced. The judge admitted that he was the number one populator of the prison at Yankton, was very familiar with its drug treatment program, was the only federal judge in the country who goes there every other month and speaks to groups in the drug treatment program, had sentenced between 1300-1400 people to prison over the last nine years, and had over 100 variance cases post-*Booker*. TS 3/10/04, pp. 12-14, 20-21; RST 5/5/06, pp. 72, 91.

placed in the 500-hour residential drug treatment program. Pepper was then to be placed on supervised release for five years. *Id.* at 18-20. The judge noted that Pepper had strong family support, had a lot of promise and potential, and expected him to do very well on supervised release. *Id.* at 21-22.

On April 12, 2004, Pepper was delivered to the prison at Yankton.

On April 19, 2004, the government appealed Pepper's sentence.

On March 10, 2005, Pepper was released from the prison at Yankton. He immediately went to a halfway house in Council Bluffs, Iowa. RST 5/5/06, pp. 19-20.

On June 24, 2005, the Eighth Circuit reversed the sentencing decisions of the district court. The Court found that the judge considered a matter unrelated to Pepper's assistance, namely his desire to sentence Pepper to the shortest possible term of imprisonment that would allow him to participate in the intensive drug treatment program at the federal prison in Yankton. *United States v. Pepper I*, 412 F.3d 995, 996, 999 (8th Cir. 2005). The case was remanded for resentencing with instructions to follow the principles set forth by the Supreme Court in *Booker*. *Id.* at 996, 998-99.

On June 27, 2005, Pepper was released from the halfway house and moved to an apartment. RST

5/5/06, pp. 19-20. He then began serving his five years of supervised release.

On May 5, 2006, the case returned for resentencing.

Prior to resentencing, counsel for Pepper filed a motion with the district court requesting a deviation from the advisory Guidelines sentence based on *Booker*. Counsel requested a deviation from the Guideline sentence based on Pepper's post-offense rehabilitation, his substance abuse issues were resolved, he was no longer a risk to the community, and the sentencing disparities that occur due to the availability of the drug treatment programs in the Bureau of Prisons.

At the resentencing three witnesses testified, Pepper, his father, and his United States probation officer.

Pepper testified his life had turned around after receiving drug treatment and after his release from prison. RST 5/5/06, pp. 19-28. He had started work at MCI, but had to stop due to lack of transportation. He found another job at Bomgaars. In the fall of 2005, he enrolled and attended a community college. At the time of resentencing, he was working part-time and was a full-time student. He received straight A's in the fall semester and had received a congratulatory letter from the dean of students. He had no problems while on pretrial release. While at Yankton, he participated in the drug treatment program, but never

received the one-year credit off his sentence because he was not there long enough. *Id.* at 22-23.

Pepper's father testified that he had a very strained relationship with his son the five years prior to his arrest. *Id.* at 32. Following his son's arrest, they began communicating again and reestablished their relationship. *Id.* at 33. He testified that his son no longer uses drugs or alcohol. His son had matured and was making plans for the future. In addition, the drug treatment program at Yankton truly sobered Jason up and changed his way of thinking. *Id.* at 34-35.

Finally, Probation Officer Chad Zach testified.[3] To help prepare the judge for resentencing, he had prepared a confidential "Memorandum" regarding the sentencing factors of 18 U.S.C. § 3553(a) and recommended a 24 month sentence. *Id.* at 37, 39. The judge adopted as his findings of fact the recommendations contained in the "Memorandum," and the testimony of Pepper and his father. *Id.* at 85, 87.

Through his testimony, and "Memorandum," Mr. Zach explained why a 24 month sentence was reasonable and identified the mitigating factors that warranted his recommendation for a limited downward variance under 18 U.S.C. § 3553(a) in conjunction with the substantial assistance reduction. Based on

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[3] Mr. Zach had been with the U.S. Probation Office for four years and had done approximately 160 presentence reports. RST 5/5/06 pp. 38-39.

his experience, Mr. Zach believed a 24 month sentence was sufficient to protect the community and that Pepper had learned his lesson. The sentence was justified because since his release from prison over the preceding year, Pepper had shown the judge he could do remarkably well in the community. RST 5/5/06, p. 44.

Through his testimony, and "Memorandum," Mr. Zach explained that Pepper had: (1) been cooperative and compliant with all conditions of release, (2) had been actively employed, (3) had been enrolled in college courses and achieved a 4.0 grade point average and was placed on the President's List, (4) had been subject to random urinalysis and all tests had been negative, and, (5) had reestablished his relationship with his father.[4] (Memorandum).

Mr. Zach evaluated for the judge, and parties, the 18 U.S.C. § 3553(a) sentencing factors that warranted a variance. Mr. Zach found that pursuant to 18 U.S.C. § 3553(a)(1) (history and characteristics of defendant) that Pepper had no history of violence. He had significant alcohol and drug abuse since age 18 and sold drugs to support his addiction, but had no substance abuse treatment prior to the instant offense. He had been drug free since his arrest in October

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[4] The government commended Pepper for being in school and employed, but stated that is what defendants are supposed to do. RST 5/5/06 p. 66. The judge responded, "[b]ut very few do," to which the government responded, "[w]ell, that's true." *Id.*

2003. He had attempted suicide after his brother's death in 1998. He was unemployed in 2000 to help take care of his ailing mother who suffered from cancer. He was homeless after his mother died in 2002. He had a distant relationship with his father. In addition, he had been compliant while on supervised release by maintaining employment, had no positive drug tests, and was a model full-time college student. (Memorandum).

Mr. Zach found that pursuant to 18 U.S.C. § 3553(a)(2) that Pepper had a minimal criminal history and had a low probability to commit future crimes. (Memorandum). Based on his experience, and discussions with Pepper's supervising probation officer, Pepper was considered a low-risk offender. RST 5/5/06 p. 41.

Mr. Zach found that pursuant to 18 U.S.C. § 3553(a)(6) (need to avoid disparities among defendants) that one of Pepper's codefendants received a 26% reduction in his sentence, one codefendant received a 70% reduction and the government withdrew its appeal regarding his sentence, and one codefendant received a 50% reduction in his sentence and the government did not appeal. (Memorandum).

Mr. Zach concluded:

> When considering the pre-sentencing variance factors, the Court may look to several mitigating factors such as: the defendant has no history of violence; he was a drug addict who sold drugs to support his addiction; the

two main supports in his life passed away (brother passed away in 1998 and his mother passed away in 2002) and it appears the defendant became unstable, which fueled his drug addiction; and sentencing disparities with two of the codefendants (Alexander Blankenship received a 70% substantial assistance reduction, which the government initially appealed but later dismissed and, Felipe Sandoval received a 50% substantial assistance reduction that was not appealed by the government).

In addition to the pre-sentencing variance factors, this is a unique remand sentencing because the defendant appears to have post-release mitigating factors since his release on June 27, 2005. Since his release, the defendant has taken positive steps in becoming a law abiding citizen. He has maintained employment and is a full-time college student where he achieved a 4.0 last semester, making the President's List. The defendant has also reunited his relationship with his father. Although the defendant had a serious drug addiction, it appears he has taken the appropriate steps to maintain a lifestyle of sobriety by completing the Bureau of Prison's 500-hour drug treatment program; however he did not receive any reduction off his sentence because he did not have enough time to serve and was released to a halfway house after he completed the program. The defendant has also complied with all conditions of his supervision. Although each offender is unique, I do not believe the defendant has

> the demeanor to commit future crimes and, therefore, his risk to the community appears to be minimal.
>
> In light of the noted mitigation factors, it appears that a limited downward variance may be warranted under 18 U.S.C. § 3553(a). If the Court concurs, a 24 month sentence (same as original sentence) would appear reasonable in conjunction with the substantial assistance reduction.

(Memorandum).

The judge then imposed Pepper's sentence. The judge concluded that he would depart 40% for substantial assistance, which would take Pepper's sentence down to 58 months. RST 5/5/05 pp. 83-84. To arrive at the 40% reduction the judge explained how he was relying on Eighth Circuit precedent, how he relied on his discussions with other federal district court judges from around the country, that Pepper was very timely, was incredibly truthful and candid, had been debriefed, engaged in a proffer, and had engaged in grand jury work. *Id.*

The judge then moved to the issue whether the facts and circumstances of Pepper's case warranted a variance from the 58 month sentence. The judge decided he did and varied down to 24 months. *Id.* at 85, 87. The judge took seven transcript pages to explain the specific reasons the 34 month variance was warranted for Pepper's "exceptional" case. *Id.* at 85-91.

The judge found that Pepper's case was "exceptional," that he had no history of violence, and that there would be a sentencing disparity between Pepper and his codefendants if Pepper did not receive a variance. *Id.* at 85-86. Specifically referencing the purpose of 18 U.S.C. § 3553(a)(2), the judge was convinced that Pepper had an "extremely low risk of recidivism" based on all the defendants he had seen. RST 5/5/06, p. 87. The judge felt obliged to consider Pepper's post-release conduct and how well Pepper had done since his release from prison. *Id.* at 88-89. The judge justified this consideration by recognizing the other side of the argument, if Pepper had been out the last year committing crimes it would be an important sentencing factor to consider during resentencing and believed that the government would advocate such a position. *Id.*

On June 5, 2006, the government again appealed Pepper's sentence.

On May 21, 2007, the Eighth Circuit Court of Appeals again reversed and remanded Pepper's sentence. *United States v. Pepper II,* 486 F.3d 408 (8th Cir. 2007). The Court found the district judge did not abuse his discretion by departing 40% for substantial assistance. *Id.* at 411. The Court reversed and remanded because it did not agree with the district judge's 34 month downward variance. *Id.* at 413.

On July 18, 2007, this Court ruled that during the second resentencing hearing the "court will not consider itself bound to reduce the Defendant's

advisory Sentencing Guidelines range by 40%, pursuant to USSG § 5K1.1. Further, in fashioning Defendant's sentence, the court will not consider any additional assistance that Defendant may have provided after his first resentencing hearing." *United States v. Pepper*, 2007 WL 2076041 *4 (N.D. Iowa 2007).

On or about August 8, 2007, Pepper filed his petition for writ of certiorari in the Supreme Court.

On February 12, 2008, the Supreme Court granted Pepper's petition for writ of certiorari. *Pepper v. United States*, ___ U.S. ___, 128 S.Ct. 871, 169 L.Ed.2d 715 (2008). App. 6. The Court ordered the Eighth Circuit's judgment vacated, and the case was remanded for further consideration in light of *Gall v. United States*, 552 U.S. ___, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

Following remand, on March 11, 2008, the Eighth Circuit again reversed the district judge and remanded for resentencing in front of a different judge. *United States v. Pepper III*, 518 F.3d 949 (8th Cir. 2008). In light of *Gall*, the Court found the district judge committed procedural error in failing to adequately explain with sufficient justifications the judge's conclusion that a 59% variance after the § 5K1.1 downward departure was warranted. *Id.* at 952. The Court found the district judge provided insufficient explanation of the "no history of violence" factor. *Id.* The Court found the district judge did not adequately explain and support its rationale for

sentencing Pepper to 24 months' imprisonment in contrast to Pepper's co-defendants. *Id.* In addition, the Court found the district judge gave significant weight to Pepper's post-sentence rehabilitation, which is an impermissible factor to consider in granting a downward variance. *Id.* at 952-53.

III. THE "LAW OF THE CASE" REQUIRES THE DISTRICT COURT TO REDUCE PEPPER'S ADVISORY SENTENCING RANGE BY AT LEAST 40% PURSUANT TO U.S.S.G. §5K1.1

This Court ruled that it would not consider itself bound to reduce Pepper's advisory Sentencing Guidelines range by 40%, pursuant to USSG § 5K1.1. *Pepper,* 2007 WL 2076041 *4.

Based on the scope of the remand by the Eighth Circuit and the law of the case, the Court is obligated, at a minimum, to reduce Pepper's advisory Sentencing Guidelines range by 40%. When the Eighth Circuit ruled that the district court did not abuse its discretion by the 40% reduction, this became the law of the case. *Pepper II,* 486 F.3d at 411.

The Eighth Circuit Court of Appeals has stated:

> The law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy. *Bethea v. Levi Strauss & Co.,* 916

F.2d 453, 456-57 (8th Cir.1990). Under this doctrine, "a decision in a prior appeal is followed in later proceedings unless a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice." *United States v. Callaway*, 972 F.2d 904, 905 (8th Cir.1992) (per curiam).

"Law of the case terminology is often employed to express the principle that inferior tribunals are bound to honor the mandate of superior courts within a single judicial system." 18 Wright, Miller & Cooper, *supra*, § 4478 at 792. "If there are no explicit or implicit instructions to hold further proceedings [on remand], a district court has no authority to re-examine an issue settled by a higher court." *Bethea*, 916 F.2d at 456. When an appellate court remands a case to the district court, all issues decided by the appellate court become the law of the case, *id.*, and the district court on remand must "adhere to any limitations imposed on its function at resentencing by the appellate court." *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir.1992) (citing *United States v. Prestemon*, 953 F.2d 1089 (8th Cir.1992) (trial court could not consider new bases for downward departure where remand was limited to resentencing within the applicable guideline range)). "Under the law of the case doctrine, a district court must follow our mandate, and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's

> terms." *Jaramillo v. Burkhart,* 59 F.3d 78, 80 (8th Cir.1995).

United States v. Bartsh, 69 F.3d 864, 866 (8th Cir. 1995).

The minimum 40% reduction is the law of the case for the following reasons.

At this point the government has not introduced substantially different evidence or shown that the *Pepper II* decision regarding substantial assistance is clearly erroneous and works a manifest injustice. To the contrary, the government admits that Pepper has given additional assistance since his last sentencing hearing. Government's Memorandum p.1 (docket no. 155) & Government's Supplemental pp. 2-3 (docket no. 160).

There were no explicit or implicit instructions in *Pepper II* to hold further proceedings on remand regarding the substantial assistance issue.

Pepper II was only reversed and remanded because the Eighth Circuit Court did not agree with the district judge's 34 month downward variance. *Id.* 486 F.3d at 411. The Court stated:

> The lack of clarity regarding the extent to which the district court relied on any one factor notwithstanding, we conclude the district court abused its discretion in granting the downward variance. The district court failed to balance the other factors in § 3553(a), such as the need to impose a sentence reflecting the seriousness of Pepper's

> offense, which involved between 1,500 and 5,000 grams of methamphetamine mixture and ten to fifteen people, or how, in this case, a sentence of 24 months would promote respect for the law. The district court impermissibly considered Pepper's post-sentence rehabilitation, and further erred by considering Pepper's lack of violent history, which history had already been accounted for in the sentencing Guidelines calculation, and by considering sentencing disparity among Pepper's co-defendants without adequate foundation and explanation.
>
> For the reasons stated, we reverse and remand this case for resentencing consistent with this opinion. The district court expressed a reluctance to resentence Pepper again should this case be remanded. Thus, we remand Pepper's case for re-sentencing by a different judge, pursuant to our authority under 28 U.S.C. § 2106 . . .

Id. at 413.

If the government was not happy with the *Pepper II* decision regarding the 40% departure, it could have challenged the reduction and filed a petition for rehearing or hearing en banc, or a petition for writ of certiorari with the United States Supreme Court. It did not.

Additionally, *Pepper III* affirmed that the 40% reduction was the law of the case and the only issue to be decided on remand was the 59% downward variance:

> We found the district court did not abuse its discretion by the extent of the § 5K1.1 downward departure. *Id.* at 411. We did find "[t]he district court impermissibly considered Pepper's post-sentence rehabilitation, and further erred by considering Pepper's lack of violent history, which history had already been accounted for in the sentencing Guidelines calculation, and by considering sentencing disparity among Pepper's co-defendants without adequate foundation and explanation." *Id.* at 413.

Pepper III, 518 F.3d at 951.

There is no hint in either *Pepper II* or *Pepper III*, or exceptions taken by the government, to indicate Pepper is entitled to anything less than a 40% reduction for substantial assistance. *See United States v. Coyle*, 506 F.3d 680, 682 (8th Cir. 2007) (Court declined to alter their previous holding that a substantial-assistance reduction from 135 months' to 36 months' imprisonment was unreasonable and rejected the defendant's contention that they should revisit their holding that the district court abused its discretion in the original sentencing.).

IV. PEPPER DESERVES A DOWNWARD SENTENCING VARIANCE UNDER 18 U.S.C. § 3553(a)

In light of *Gall v. United States*, *infra*, and 18 U.S.C. § 3553(a), Pepper's age at the time of the offense, his lack of a criminal record, his lack of a

violent history, his drug addiction at the time of the offense, his extra-ordinary and genuine post-offense and sentencing rehabilitation and change in life circumstances, the need to avoid disparity among co-defendants, the costs of incarceration, his exemplary behavior on supervised release, his family obligations, his remorse, his continued assistance, and sense of justice, warrant a final sentence of 24 months. These factors either separately or in the aggregate are permissible factors which can support a sentencing variance under 18 U.S.C. § 3553(a).

Clear sentencing principles were discussed by the Supreme Court in *Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

First, the Court reaffirmed its position, based on *Booker,* that the Guidelines are advisory, and appellate review of sentencing decisions are limited to determining whether they are "reasonable." *Id.* at 594

Second, a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. *Id.*

Third, when reviewing the reasonableness of a sentence outside the Guideline range, appellate courts may take the degree of variance into account and consider the extent of a deviation from the Guidelines. *Id.* at 594-595. The Court rejected an appellate

rule that required "extraordinary" circumstances to justify a sentence outside the Guidelines range. *Id.*

Fourth, the district judge should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. *Id.* at 596. After giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. *Id.* The judge must make an individualized assessment based on the facts presented. *Id.* at 597. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. *Id.* After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. *Id.*

A. History and Characteristics of Pepper

Pepper's age at the time of the offense, his lack of a criminal record, his lack of a violent history, his drug addiction at the time of the offense, and his remorse are appropriate sentencing variance factors under § 3553(a). Additionally, Pepper now has a wife and child to support.

(i) Lack of violence and criminal history. Pepper has no history of violence. The probation officer also

recognized Pepper's history and characteristics. *See supra* pp. 8-10.

In this case, the Eighth Circuit found the judge impermissibly double counted Pepper's lack of violent history because his lack of criminal history had already been considered under the guidelines. *Pepper III*, 518 F.3d at 952.

This statement seems contrary to the Eighth Circuit's holding that a district court, in applying § 3553(a), may consider factors already taken into account in calculating the advisory range, but cautioned that substantial variances based upon factors already taken into account in a defendant's guidelines sentencing range seriously undermine sentencing uniformity. *United States v. Wiley*, 509 F.3d 474, 478 (8th Cir. 2007).

The Eighth Circuit has previously held that lack of violence is a proper factor to consider under § 3553. "While the lack of violence or involvement of firearms is properly considered under § 3553(a)(1) ("the nature and circumstances of the offense . . . "), the presence or absence of these facts is also considered in determining the advisory guidelines." *United States v. Plaza*, 471 F.3d 876, 879 (8th Cir. 2006). While the district court can consider facts taken into account by the guidelines in its analysis, it cannot solely rely on these facts to support a substantial downward variance. *Id.* at 879 (citation omitted).

Pepper's lack of violence is a proper sentencing factor to consider under § 3553(a). Pepper's lack of

violent history is a distinctive "characteristic of the defendant" under § 3553(a)(1) much like "immaturity at the time of the offense" is a mitigating factor as recognized by the Court in *Gall*. *Gall*, 128 S.Ct. at 601 (Given the dramatic contrast between Gall's behavior before he joined the conspiracy and his conduct after withdrawing, it was not unreasonable for the District Judge to view Gall's immaturity at the time of the offense as a mitigating factor, and his later behavior as a sign that he had matured and would not engage in such impetuous and ill-considered conduct in the future. Indeed, his consideration of that factor finds support in our cases.)

(ii) Youth and drug addiction. Pepper was young and a drug addict at the time of his offense.[5] *See supra* pp. 9-10 (he was a drug addict who sold drugs to support his addiction; the two main supports in his life passed away (brother passed away in 1998

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[5] In *United Feemster*, 531 F.3d 615 (8th Cir. 2008), the Eighth Circuit found that the district court did not abuse its discretion in giving significant weight to Feemster's status as a juvenile at the time of some of his prior adult convictions, *id.* at 619; that Feemster's age, alone or together with the district court's other justifications, had little, if any, relevance and was not a sufficient justification for the extent of the unusually lenient sentence, *id.* at 620; that the absence of a weapon was irrelevant and not a sufficient justification for the unusually lenient sentence, *id.*; and, Feemster's successful completion of two terms of probation was irrelevant and was not a sufficient justification for the district court's unusually lenient sentence, *id.* at 621. This opinion was vacated and rehearing granted on October 1, 2008.

and his mother passed away in 2002) and it appears the defendant became unstable, which fueled his drug addiction).

The Eighth Circuit has not precluded a downward variance because of drug addiction or abuse or precluded a downward variance because of youth and immaturity; the Court has stated that it does not warrant a large downward variance.

Drug addiction or abuse is not a proper reason to impose a downward variance, absent exceptional circumstances. *United States v. Lee,* 454 F.3d 836, 839 (8th Cir. 2006) (citations omitted). If a defendant's drug use does not distinguish him in some significant way from other defendants, it is not a factor which will support a large downward variance. *Plaza,* 471 F.3d 880 (citation omitted) (The district court noted that Plaza used methamphetamine since 1996 and was once hospitalized in Mexico as a result. Plaza's drug addiction, though, is not unique among other defendants involved in drug conspiracies, and the district court clearly erred in granting a large downward variance based on this factor.)

In this case, Pepper he was a drug addict who sold drugs to support his addiction; when the two main supports in his life passed away (brother passed away in 1998 and his mother passed away in 2002) it appears he became unstable, which fueled his drug addiction. *See supra* pp. 9-10.

An extraordinary reduction of a sentence cannot be based largely on the youth of the defendant

because "[r]elative youth is a factor that may apply to many [defendants], and it is unlikely that district courts uniformly will adopt the view of the district court in this case." *Plaza,* 471 F.3d at 879 (citation omitted) (If Plaza received a large variance because he was 24 years old, his sentence would create vast disparities among other defendants, even those of similar age, sentenced for similar drug conspiracy crimes. Furthermore, the instant offense was not a onetime youthful indiscretion. Plaza, despite his age, has had several drug convictions. Indeed, he was a federal fugitive at the time the police arrested him for this conspiracy crime. In light of these facts, the district court clearly erred in basing a large downward variance on Plaza's age.).

In this case, Pepper was 24 when he was arrested with no history of violence.[6]

(iii) Remorse. Pepper has been remorseful throughout his prior sentencing hearings and will be remorseful during his second resentencing. A defendant's

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[6] The Supreme Court in *Gall,* when relying on the district judge's findings, recognized that immaturity and age are factors to be considered: "Immaturity at the time of the offense conduct is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five. . . . [T]he recent [National Institute of Health] report confirms that there is no bold line demarcating at what age a person reaches full maturity. While age does not excuse behavior, a sentencing court should account for age when inquiring into the conduct of a defendant." *Id.* 128 U.S. at 601.

degree of remorse at sentencing may be considered as a basis for downward variance under § 3553(a) regardless of whether the defendant previously accepted responsibility. *United States v. Howe*, 2008 WL 4251920, *9 (3rd Cir. 2008), citing *United States v. Todd,* 515 F.3d 1128, 1134 n. 3 (10th Cir. 2008).

(vi) [sic] *Recidivism rates.* The likely hood [sic] that Pepper will commit future crimes is low. Recidivism rates decline relatively consistently as age increases. *See Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines*, A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate (May 2004) at 12 (Available at: http://www.ussc.gov/publicat/Recidivism). The recidivism rate for a person age 29, is 13.3%. *Id.* at 28.

Those with stable employment in the year prior to their instant offense are less likely to recidivate than are those who are unemployed. *Id.* at 12. The recidivism rate for one employed, with a Criminal History Category I, is 12.7%. *Id.* at 29.

Recidivism rates for offenders with different educational backgrounds also differs. Overall, offenders with less than a high school education are most likely to recidivate, followed by offenders with a high school education, and offenders with some college education. *Id.* at 12. The recidivism rate for a college graduate, with a Criminal History I, is 7.1%. *Id.* at 29.

Offenders who have never been married are most likely to recidivate. *Id.* at 12. Those who are married are slightly less likely to recidivate than are those who are divorced. *Id.* The recidivism rate for one who is married, with a Criminal History I, is 9.8%. *Id.* at 29.

B. Post-Offense and Sentencing Rehabilitation and Exemplary Behavior

The Eighth Circuit Court of Appeals ruled that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance. *Pepper III*, 518 F.3d at 952-53. This does not seem quite fair considering the Eighth Circuit has recognized that post-offense/pre-sentencing misconduct warrants a four-level upward variance because such misconduct demonstrates lack of acceptance of responsibility and is clearly relevant to § 3553(a) factors, such as protecting the public from future crimes, deterring criminal conduct and promoting respect for the law. *See United States v. Jones*, 509 F.3d 911, 913-14 (8th Cir. 2007) (While in jail awaiting sentencing, Jones engaged in numerous incidents of disruptive behavior, including damaging a window, swinging a piece of broken glass and a telephone cord in a threatening manner, flooding his cell on numerous occasions, threatening to harm himself, throwing a cup of urine at a correction officer and speaking and acting disrespectfully toward the jail staff. The U.S. Probation Office recommended that the district court

consider imposing an upward variance based upon his misconduct in jail.).

Two of its own circuit judges have questioned the Eighth Circuit precedent. These judges also recognized a conflict among the courts of appeals. Regarding post-sentencing rehabilitation, Circuit Judge Melloy wrote:

> My concern with this case, and the reason for my concurrence, is the binding precedent upon which the *McMannus* decision rests, that is, the inability to consider post-sentencing rehabilitation. I would join the Third Circuit and hold that post-sentencing rehabilitation is not normally relevant, however, there are exceptional cases in which it may be considered. *United States v. Lloyd,* 469 F.3d 319, 325 (3rd Cir. 2006); *see also, United States v. Butler,* 221 Fed.Appx. 616, 617 (9th Cir. 2007) (unpublished). I would also find that this is such an exceptional case and that if we could consider post-sentencing rehabilitation, the sentence in this case would be reasonable. The majority has outlined the post-sentencing rehabilitation testimony and characterizes the evidence the district court heard as " . . . extensive and compelling . . . " *ante* at 851. While I do not disagree with the concept that post-sentencing rehabilitation should not normally be considered because of the potential windfall to those defendants who are the beneficiaries of resentencings, I also do not believe that we should have a rule that never allows an experienced

> district judge to consider that evidence. Certainly, such evidence is valuable in a case such as this where the post-sentencing rehabilitation not only involves conduct while incarcerated, but exceptional performance while in a half-way house and then following release to the community. Both the state probation officer who supervised Mr. McMannus in the half-way house and the federal probation officer who is currently supervising him on supervised release testified to his exceptional conduct.
>
> In assessing at least three of the Section 3553(a) factors, deterrence, protection of the public and rehabilitation, 18 U.S.C. § 3553(a)(2)(B)(C) & (D), there would seem to be no better evidence than a defendant's post-incarceration conduct. In an exceptional case, such as this, I would permit the district court to consider that evidence in fashioning a reasonable sentence.

United States v. McMannus, 496 F.3d 846, 853 (8th Cir. 2007) (Melloy, C.J. and Smith, C.J., concurring).[7]

The Third Circuit in *United States v. Lloyd*, 469 F.3d 319 (3rd Cir. 2006) found that in an unusual case a district court could consider a defendant's

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[7] Prior to his appointment to the Eighth Circuit Court of Appeals, Circuit Judge Melloy was a United States District Court Judge for the Northern District of Iowa. Judge Melloy knows first hand what type of evidence is valuable at sentencing.

post-sentencing rehabilitation efforts when resentencing. *Id.* at 325. The Court did ultimately find there were no post-sentencing circumstances that warranted a variance or departure for Mr. Lloyd. *Id.*

While it is an unpublished opinion, the Ninth Circuit in *United States v. Butler*, 221 Fed.Appx. 616, 2007 WL 582698 (9th Cir. 2007) (unpublished), found:

> Under the 1995 version of the Sentencing Guidelines applicable to Butler, the district court erred in concluding not to consider Butler's post-sentence rehabilitation as a basis for downward departure. Although in many instances such an error would be immaterial in a post-*Booker* world, we cannot conclude the error was harmless in this case. While indicating a general awareness it could sentence outside Guidelines after *Booker*, the district court did not take into consideration Butler's successful participation in various Bureau of Prisons programs, and that if consideration of those post-sentencing factors was appropriate, "this Court would find defendant should be given credit for that under the guideline structure and would be a basis for departure."

Id. 221 Fed.Appx. at 617-618, 2007 WL 582698.

Pepper, his father and the probation officer have all provided information regarding Pepper's life on supervised release following federal prison. *See supra* pp. 4-5, 7-10. Pepper has been employed, sober, excelling in college, and married. This information is

extremely relevant in assessing at least three of the Section 3553(a) factors, deterrence, protection of the public and rehabilitation, 18 U.S.C. § 3553(a)(2)(B)(C) & (D). *See McMannus,* 496 F.3d at 853 (Melloy, C.J. and Smith, C.J., concurring). *See also Gall,* 128 S.Ct. at 600-01 (The District Court quite reasonably attached great weight to the fact that Gall voluntarily withdrew from the conspiracy after deciding, on his own initiative, to change his life. This lends strong support to the District Court's conclusion that Gall is not going to return to criminal behavior and is not a danger to society. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C). Compared to a case where the offender's rehabilitation occurred after he was charged with a crime, the District Court here had greater justification for believing Gall's turnaround was genuine, as distinct from a transparent attempt to build a mitigation case.).

Pepper has not made a transparent attempt to build a mitigation case. He has been out of prison for nearly three and a half years under supervised release[8], has had no problems, is attending school

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[8] Custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. *Gall*, 128 S.Ct. at 595. Offenders on probation are subject to several standard conditions that substantially restrict their liberty. *Id.* Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. *Id.* at 595-96. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted

(Continued on following page)

full-time, is motivated to enter a manager-in-training program, is currently employed, was named associate of the year last year at the Sam's Club, was married in May 2007, and has taken on the responsibilities of a child. Pepper has not done all this to fool the Court.

There is nothing more telling of Pepper's ability to be a productive, law-abiding member of society than his exemplary behavior after his release from prison. With this information, there is no need to speculate as to whether the sentence already imposed on Pepper was sufficient to promote his respect for the law or to provide adequate deterrence to future criminal conduct. *See* § 3553(a)(2)(A) & (B). This evidence proved that the sentence already imposed, and still imposed due to supervised release, has protected the public from further crimes. *See* § 3553(a)(2)(C). Pepper has successfully received substance abuse treatment. *See* § 3553(a)(2)(D). Additionally, it proves that Pepper is not going to return to criminal behavior and is not a danger to society. *See* 18 U.S.C. §§ 3553(a)(2)(B), (C).

Until the United States Supreme Court rules otherwise, Pepper's post-offense and post-sentencing rehabilitative efforts warrant a downward variance under 18 U.S.C. § 3553(a).

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of a felony, and refrain from excessive drinking. *Id.* at 596. Most probationers are also subject to individual "special conditions" imposed by the court. *Id.*

C. Sentencing Disparity among Codefendants

One of the factors district courts must consider when imposing a sentence is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

In the Eighth and Tenth Circuit Courts of Appeal, the courts focus on the codefendants involved in the defendant's case when construing § 3553(a)(6). *See Pepper*, 518 F.3d at 952 (In light of *Gall*'s requirement that sentencing judges adequately explain the chosen sentence, we correctly concluded in *Pepper II* that "[t]he district court did not adequately explain and support its rationale for sentencing Pepper to 24 months' imprisonment in contrast to Pepper's codefendants."); *United States v. Krutsinger*, 449 F.3d 827, 830 (8th Cir. 2006) (We cannot say the district court abused its discretion in fashioning a sentence that attempted to address the disparity in sentences between two nearly identically situated individuals who committed the same crime in the same conspiracy."); and, *United States v. Smart,* 518 F.3d 800, 804 (10th Cir. 2008) (a district court may properly account for unwarranted disparities between codefendants who are similarly situated and the district court may compare defendants when deciding a sentence).

In the Third, Fifth, and Seventh Circuit Courts of Appeal [sic], the Circuits focus on national uniformity among defendants when construing § 3553(a)(6). *See*

United States v. Parker, 462 F.3d 273, 277 (3rd Cir. 2006) (We have concluded that Congress's primary goal in enacting Section 3553(a)(6) was to promote national uniformity in sentencing rather than uniformity among codefendants in the same case. A defendant cannot rely upon Section 3553(a)(6) to seek a reduced sentence designed to lessen disparity between codefendants' sentences.); *United States v. Candia,* 454 F.3d 468, 476 (5th Cir. 2006) (the § 3553(a) disparity factor involves consideration of the need to avoid disparity among similarly-situated defendants nationwide rather than disparity with a defendant's differently situated codefendant); and *United States v. Pisman,* 443 F.3d 912, 916 (7th Cir. 2006) (comparison of codefendants is not a proper application of the § 3553(a) mandate that a court minimize unwarranted disparities in sentences).

In this case, the original sentencing the judge heard specific testimony regarding Pepper's substantial assistance. *See supra* pp. 9-10. The probation officer testified and provided a "Memorandum" regarding each of the codefendant's sentences, culpability, reductions, and the reasoning for each reduction. *See id.* Further, the judge presided over the codefendant's cases and was specifically familiar with each defendant's role, culpability, and specific sentences. RST 5/5/06 pp. 86-87. The Supreme Court has addressed the sentencing judge's unique position in making specific findings regarding its sentencing decision in a particular case.

> [T]he district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.

Koon v. United States, 518 U.S. 81, 98-99, 116 S. Ct. 2035, 2046-47 135 L. Ed. 2d 392 (1996) (quotations omitted).

The judge stated that unwarranted sentencing disparity among the codefendants was a factor in his determination to grant a downward variance. RST 5/5/06 pp. 86-87. The probation officer also recognized this factor. The Court in *Gall,* 128 S.Ct. at 599-600, and 18 U.S.C. § 3553(a)(6) recognize this an appropriate sentencing factor.

In this case the factual findings by the original sentencing judge and the probation officer support a variance to avoid unwarranted sentence disparities between either the codefendants in Pepper's case and/or defendants across the country.

D. Costs of Incarceration

The Court should also consider "the kinds of sentences available" under Section 3553(a)(3), and that to incarcerate Pepper again will be costly. A factor that the Court can consider is that Pepper is going to college and gainfully employed (in fact a very productive and responsible employee working in a supervisory role), supporting a family and paying taxes. To incarcerate Pepper yearly will cost $24,922.00. *See attached* Cost of Incarceration and Supervision. To keep him on supervised release will cost $3,621.64. *Id.* The cost for supervised release for Pepper is probably less since he is so compliant.

V. ADDITIONAL ASSISTANCE

The government has previously stated that in the time between Pepper's last sentencing hearing and now, he has provided some additional assistance. Government's Memorandum p.1 (docket no. 155) & Government's Supplemental pp. 2-3 (docket no. 160).

If during the second resentencing the government states it will not be requesting an additional departure for Pepper's extra cooperation and assistance and/or will not be filing a Rule 35 motion, this will also warrant a downward variance under § 3553(a). Additionally, his further assistance can not be included in the already 40% reduction approved by the Eighth Circuit Court.

The Court can also consider whether the government is acting in bad faith by failing to recognize and reward Pepper's additional assistance. Absent a motion by the government, a district court generally lacks the authority to grant a downward departure based on a defendant's substantial assistance, but

> [a] district court may review, however, a prosecutor's refusal to make a substantial-assistance downward departure motion and may grant a defendant relief if the refusal was unconstitutional, [*Wade v. United States,* 504 U.S. 181, 185-86, 112 S. Ct. 1840, 118 L. Ed. 2d 524 (1992)], or motivated by bad faith. *United States v. Rounsavall,* 128 F.3d 665, 667-68 (8th Cir. 1997). A defendant is entitled to an evidentiary hearing on his allegation of an unconstitutional or bad faith refusal, but only if he first makes a substantial threshold showing. *Wade*, 504 U.S. at 186, 112 S.Ct. 1840 .

United States v. Wolf, 270 F.3d 1188, 1190 (8th Cir. 2001).

> A refusal may also be unconstitutional if it is irrational, for an irrational refusal denies the defendant due process of law. *See* [*Wade*] (explaining that the defendant "would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end"); *Chapman v. United States,* 500 U.S. 453, 464-65, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991) (noting

that a sentencing provision that is arbitrary and thus irrational offends due process).

Id.

"The government has no duty to make a substantial assistance motion unless it has entered into a plea agreement with the defendant that creates such a duty." *United States v. Mullins,* 399 F.3d 888, 889-90 (8th Cir. 2005) (internal alterations and quotation marks omitted).

"A district court may review the government's refusal to make a substantial assistance motion under section 3553(e) or section 5K1.1, if such refusal (1) was prompted by an unconstitutional motive, such as the defendant's race or religion; or (2) was not rationally related to a legitimate government interest." *Id.* at 890, *citing Wade,* 504 U.S. at 185-87, 112 S.Ct. 1840. There is an intra-circuit split whether bad faith is an additional basis for compelling a motion for downward departure based on substantial assistance. *See Holbdy,* 489 F.3d at 913 n. 2, *comparing United States v. Moeller,* 383 F.3d 710, 712 (8th Cir. 2004), *with United States v. Wolf,* 270 F.3d 1188, 1191 (8th Cir. 2001) *and United States v. Kelly,* 18 F.3d 612, 617-18 (8th Cir. 1994). This court reviews the denial of a motion to compel for an abuse of discretion. *United States v. McClure,* 338 F.3d 847, 850 (8th Cir. 2003).

"[A] claim that a defendant merely provided substantial assistance will not entitle a

> defendant to a remedy or even to discovery or an evidentiary hearing. Nor would additional but generalized allegations of improper motive." *Wade,* 504 U.S. at 186, 112 S.Ct. 1840. Instead, to obtain an evidentiary hearing, "a defendant must make a 'substantial threshold showing' that the government's refusal to make a substantial assistance motion was premised on an improper motive." *Mullins,* 399 F.3d at 890, *quoting Wade*, 504 U.S. at 186, 112 S.Ct. 1840. "This threshold showing requires more than the presentation of evidence of substantial assistance and general allegations of improper motive because we presume a prosecutor has properly discharged her duties absent clear evidence to the contrary." *United States v. Pamperin,* 456 F.3d 822, 825 (8th Cir. 2006) (internal citations and quotation marks omitted).

United States v. Perez, 526 F.3d 1135, 1138 (8th Cir. 2008) (The government decided not to move for a downward departure based on Perez's disruption of the investigation of M.H., his threats, and his false statements to federal agents. Perez proffered no evidence that the government's decision was prompted by an unconstitutional motive. The refusal was rationally related to a legitimate governmental end, providing an incentive for defendants to cooperate fully with authorities.).

In *United States v. Anzalone,* 148 F.3d 940 (8th Cir. 1998), the prosecutors refused to file a substantial assistance motion because they received information

that Anzalone had recently used and possessed controlled substances, thereby violating a provision of his plea agreement. *Id.* at 941. The Eighth Circuit concluded that the government's refusal to file the motion was based solely upon a reason unrelated to the quality of Anzalone's assistance in investigating and prosecuting other offenders. *Id.*

VI. CONCLUSION

Each of the enumerated factors, either separately or in the aggregate, are permissible factors supporting a sentencing variance under 18 U.S.C. § 3553(a) after *Gall v. United States* and justify the extent of a variance down to 24 months.

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ADMINISTRATIVE OFFICE OF
THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

May 6, 2008

(Filed Oct. 13, 2008)

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Office of Probation and Pretrial Services

TO: CHIEF PROBATION OFFICERS
CHIEF PRETRIAL SERVICES OFFICERS

FROM: Matthew Rowland, Deputy Assistant Director

RE: Cost of Incarceration and Supervision (**IMPORTANT INFORMATION**)

The chart below reflects the fiscal year 2007 cost of supervision by probation and pretrial services officers as compared to the cost of incarceration and pretrial detention. The cost of supervision is calculated using the current work measurement formula, probation/pretrial services officer salary costs, law enforcement account obligations, and miscellaneous operating expenses.

The Bureau of Prisons provided the figures for the cost of imprisonment and Community Corrections Center placement. Pretrial detention costs were provided by the Department of Justice's Office of Federal Detention Trustee.

	Imprisonment in Bureau of Prisons Facility	Community Correction Centers	Supervision by Probation Officers	Supervision by Pretrial Services Officers	Pretrial Detention Services
Daily	$ 68.28	$ 62.66	$ 9.92	$ 5.85	$ 64.40
Monthly	$ 2,076.83	$ 1,905.92	$ 301.80	$ 177.81	$ 1,958.83
Annually	$ 24,922.00	$ 22,871.00	$ 3,621.64	$ 2,133.72	$ 23,506.00

Pursuant to U.S.S.G. §5E1.2(d)(7) and 18 U.S.C. § 3572(a)(6), the court shall, when determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, consider the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence. We ask that probation officers begin to reference the updated costs in their presentence reports.

Questions regarding the supervision costs may be directed to Program Analyst Kevin Wilson at (202) 502-1639 or by e-mail at Kevin Wilson/DCA/AO/USCOURTS.

cc: Clerks, United States District Courts

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA WESTERN DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JASON PEPPER,** **Defendant.**	**Criminal No. 03-4113 LRR** **DEFENDANT'S REQUEST FOR VARIANCE BELOW THE GUIDELINE** (Filed Oct. 14, 2008)

Request for Variance Below the Guideline Range

This case warrants a variance and/or a sentence below the properly calculated Guideline range. The district court can impose a sentence that is below the Guideline range based on the factors set out in 18 U.S.C. § 3553(a) and *Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

A variance and/or a sentence below the properly calculated Guideline range are warranted based on the following factors:

(1) Pepper's age at the time of the offense;

(2) Pepper's lack of a criminal record;

(3) Pepper's lack of a violent history;

(4) Pepper's drug addiction at the time of the offense;

(5) Pepper's extra-ordinary and genuine post-offense and sentencing rehabilitation;

(6) The need to avoid disparity among co-defendants;

(7) The cost to incarcerate Pepper is great, as opposed to supervised release when he can be working, paying taxes, and going to college;

(8) Pepper's exemplary behavior on supervised release;

(9) Pepper's continued cooperation;

(10) Pepper's remorse;

(11) Pepper's family obligations;

(12) Pepper's recidivism rate is very low;

(13) It appears even though Pepper completed the RDAP program at Yankton (and did not get a reduction in his sentence as a result) if Pepper is sent back to prison he cannot do the program again, nor can he get a "retroactive" reduction on his new sentence; and,

(14) Based on the unique features of this case, justice and fairness warrant a variance.

A memorandum has been filed.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	No. CR 03-4113-LRR
JASON PEPPER,	)	
Defendant.	)	

GOVERNMENT'S SENTENCING MEMORANDUM AND RESPONSE TO DEFENDANT'S MEMORANDUM

(Filed Oct. 14, 2008)

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1. WITNESSES AND EXHIBITS

The United States anticipates a contested hearing and does not intend to call witnesses or present

exhibits. It appears that defendant has exhibits, to which the government does not object, but is not clear if he intends to present witnesses.

2. RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM

A. Introduction

Defendant has filed a 32 page sentencing memorandum. Included in the memorandum is a request for an "extraordinary sentencing variance" (Def. Brief p. 1). This request is based in large part on grounds rejected by the Eighth Circuit and by this court. The United States believes that a variance is unwarranted in this case, and requests that this court sentence defendant within the guideline range, after an appropriate departure to reward defendant for his assistance to the government.

B. Specific Grounds for variance

Defendant requests a variance from the sentencing guidelines for 12 separate reasons. (Defendant's Brief p. 2-3). The United States believes that none of these warrant a variance, or are specifically prohibited grounds for variance pursuant to prior orders of the Eighth Circuit or this court.

1. *Age of defendant.* Defendant claims that his sentence should be reduced because at the time of his arrest he was 24 years old. (Defendant's Brief p. 19-20). Defendant properly cites *United States v. Plaza*, 471

F.3d 876 (8th Cir. 2006), which holds that a large variance for youth could create disparity. It seems, therefore, that defendant believes a small variance could be appropriate for his youth. The government submits that the age of defendant is not a reason for any variance in this case. Defendant was not an 18 year-old just out of high school, but an adult who chose to engage in large scale drug dealing. This factor does not support a variance.

2. *Lack of criminal history and lack of violent history*. Defendant claims that his lack of criminal history and lack of violent history support a variance. (Defendant's Brief p. 17-18). It appears that these claims do not support a variance in this case. In *United States v. Pepper*, 518 F.3d 949 (8th Cir. 2008), the Eighth Circuit Court stated that the district court erred because it considered these factors, or did not adequately explain how they justified the variance. The Court stated:

> First the district court considered Pepper had "no history of violence." Although the district court attempted to distinguish Pepper's lack of violent history from Pepper's lack of a violent criminal history, in *Pepper II* we found this distinction vague and unpersuasive because "[t]he district court did not substantiate what it meant by "no history of violence." (Internal citation omitted.) Because the district court did not adequately explain what it meant by "no history of violence" we reached the "inescapable conclusion" that the district court improperly "double counted"

> Pepper's lack of violent history in arriving at Pepper's sentence. We reasoned: "[I]f Pepper had a violent *criminal* history, he would have been ineligible for safety-valve relief, subject to the 120-month statutory mandatory minimum, and the possibility of an enhancement or an upward departure. To the extent the district court considered the absence of violence in Pepper's life generally, we have previously held the absence of grounds that justify further punishment is not a ground for a downward variance." (Internal citation omitted). Our reasoning in *Pepper II* is consistent with *Gall*. *Gall* requires a district judge to explain adequately and provide sufficient justifications for why an unusually lenient sentence such as Pepper's is appropriate. (Internal citation omitted). The district court in Pepper's case provided insufficient explanation of the "no history of violence" factor.

Id. at 952.

Here, the defendant simply restates the same grounds that the Circuit determined were insufficient to support a variance. The request on these grounds should be denied.

3. *Drug addiction at the time of the offense.* Defendant claims that the fact that he was addicted to drugs at the time of his crime should be used to support a variance. This factor standing alone can not be used to support a variance, absent exceptional circumstances. *United States v. Lee*, 454 F.3d 836 (8th

Cir. 2006). This personal characteristic of defendant also can support a higher sentence rather than simply justify a downward variance. It seems that no one should have a better realization of the destructive nature of methamphetamine than someone addicted to the drug. Selling the drug certainly seems to advance the addiction of an unknown number of others, thereby perpetuating the cycle of addiction. Why should this qualify as a mitigating factor for defendant?

4. *Extraordinary and genuine post-offense and sentencing rehabilitation.* The defendant claims that his post-sentencing rehabilitation and exemplary behavior on supervised release justify a variance. (Defendant's Brief p. 3, 21-25). This issue has been expressly foreclosed by the precedent of the Eighth Circuit. *United States v. Pepper*, 518 F.3d 949 (8th Cir. 2008), *United States v. McMannus*, 496 F.3d 846 (8th Cir 2007).

5. *Unwarranted Disparity.* Defendant claims a variance is warranted to avoid disparity. The Eighth Circuit addressed this as well stating:

> "Indeed, considering co-defendant Blankenship's 72 month sentence, it appears Pepper's 24 month sentence *creates,* rather than avoids, sentencing disparity among co-conspirators. In light of *Gall's* requirement that sentencing judges adequately explain the chosen sentence, we correctly concluded in *Pepper II* that "the district court did not adequately explain and support its rationale

> for sentencing Pepper to 24 months' imprisonment in contrast to Pepper's co-defendants." (Internal citations omitted).

United States v. Pepper, 518 F.3d 949 (8th Cir. 2008).

This does not support a variance from the guideline range.

6. *Costs of incarceration.* The defendant believes the cost of incarceration should support a variance for defendant. (Defendant's Brief p. 27-28). This argument could be made for every defendant and does not appear to be an issue the court should consider for a variance. This should be a matter for the Congress to decide, and if and when it determines that the costs of incarceration are prohibitive, it can adjust sentencing accordingly.

7. *Continued cooperation.* Defendant wishes the court to consider his additional assistance in determining sentence. This issue was expressly foreclosed by this court in it's order of July 18, 2008. This court said; "It would, however, be plainly inconsistent with governing precedent and *Pepper II* to consider any substantial assistance Defendant may have provided authorities after his first resentencing hearing in fashioning his sentence at the second resentencing hearing." (Order p. 5 July 18, 2008).

8. *Remorse and family obligations.* The family obligations of defendant occurred post-sentencing and are therefore foreclosed for consideration. (See #4 above). The remorse of defendant was adequately

addressed by the three level reduction he received for his acceptance of responsibility and should not be considered grounds for variance.

9. *What is just.* Defendant claims it is "just" to sentence him to the original sentence of 24 months. (Defendant's Brief p. 3). What is "just" is to sentence defendant commensurate with his offenses, taking into account relevant precedent, 18 U.S.C. § 3553, and the appropriate guideline sentence after reduction for defendant's assistance. It is to this court to determine the appropriate sentence after considering the legal framework.

C. Law of the Case

Defendant claims that this court is required to reduce defendant's sentence by 40% for his assistance and claims that this is the law of the case. This issue has been addressed and ruled upon by this court which determined that it could, and would, review the substantial assistance departure de novo, and not consider itself bound. (Order July 18, 2008). Defendant's claim is precluded by this court.

D. Conclusion

The district court should deny defendant's request for variance and sentence him within the applicable guideline range, after determining the proper reduction to reward his substantial assistance.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JASON PEPPER,

Defendant. /

No. CR03-4113

TRANSCRIPT OF RESENTENCING

The Resentencing held before the Honorable Linda R. Reade, Chief Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 320 Sixth Street, Sioux City, Iowa, October 17, 2008, commencing at 2:46 p.m.

APPEARANCES

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Also present: Stacy Sturdevant,
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Reported by: Shelly Semmler, RMR, CRR
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[2] THE COURT: Thank you. Please be seated. All right. The matter before the Court is United States of America versus Jason Pepper. This is Criminal Number 3-4113-4. This is a resentencing. Mr. Pepper is here with his attorneys, Alfredo Parrish and Leon Spies. Assistant United States Attorney Jack Lammers is here. Also present is Stacy Sturdevant. Miss Sturdevant is the supervising probation officer that's going to be helping me today.

I'm working off of a presentence investigation report dated March 3, 2004. I also have retrieved the sentencings transcripts from the other sentencings that were done by Judge Bennett. I've retrieved the opinions of the Eighth Circuit Court of Appeals. I have pulled the presentence investigation reports on all the related defendants as well as the transcripts of their sentencing proceedings. And I want to just mention the people that I see as having related cases. And then if you have others, I'll pull those as well.

I have Mr. Blankenship, Mr. Berragan-Torres, Mr. Hamel, Miss Perez, and Mr. Sandoval.

Mr. Lammers, would those be the related cases from your point of view?

MR. LAMMERS: Yes, Your Honor.

THE COURT: And, Mr. Parish, Mr. Spies, I'm not sure what's going to take the lead. Mr. Spies, would these be related?

[3] MR. SPIES: I believe that they are, Your Honor. And just for the clarification of the Court, the way we intend to handle this with the Court's permission is that I'm going to address the departure issue, and Mr. Parrish will address the variance issue.

THE COURT: All right.

MR. SPIES: Issues.

THE COURT: All right. Very fine.

MR. SPIES: But the answer to your question is yes.

THE COURT: Okay. Thanks. All right. First let's go back to the presentence investigation report and the computation of the advisory guideline sentence. In all of the sentencing transcripts that I read, there was never an argument about the scoring of the advisory guidelines sentence. It's my understanding that everyone is in agreement that the total

offense level is 30, criminal history category 1. So with safety valve, it would be 97 to 121 months.

Probation would not be an option; supervised release, three to five years with the safety valve; fine, 15,000 to 4 million dollars; and a $100 special assessment and that the statutory provisions we'd be dealing with are a mandatory minimum of ten years to life, and that's before safety valve. Probation would not be an option; supervised release, at least 5 years understanding he'd be safety valve eligible, a fine of up to 4 million dollars, and a $100 special assessment.

[4] Mr. Lammers, is that your understanding of the advisory guideline before any departure or variances?

MR. LAMMERS: It is, Your Honor.

THE COURT: All right. And no quarrel with that.

MR. LAMMERS: No, Your Honor.

THE COURT: All right. And, Mr. Spies.

MR. SPIES: We agree, Your Honor, that as we understand the record there were no objections to the guideline calculations as I reviewed the transcripts as well.

THE COURT: All right. So the Court does make the finding that we're at total offense level 30, criminal history category 1, and then the Court will take up departures or variances.

I just would like to clarify for all of you so you kind of know what my thinking is about how to attack this very difficult resentencing, difficult because of the number of prior sentencings, difficult because of the number of prior Eighth Circuit opinions on this case, and difficult because, as you know, this is the only case out of the related cases that I'm going to be sentencing which raises some other issues when you apply the 3553(a) factors.

So I think the fairest thing to do today is to take all the argument, all the evidence, and then I do intend to write on this one because it is so complicated, and I do want an opportunity to weigh, sift, and evaluate everything I hear [5] today, everything I've read. That would require that we get back together for the actual imposition of sentence. And I know that is an inconvenience, but I think it's worth the extra effort so that this Court can do the very best job possible in trying to reach a disposition.

One thing we could to lessen the burden on the defendant who I understand from probation is closer to Cedar Rapids than he is to Sioux City is potentially – and I'll let you react to this – for the imposition of sentence actually do it at the Cedar Rapids court point as opposed to Sioux City, and Mr. Lammers might want to come over or he might want to just send someone because all I'll be doing is imposing the sentence.

So what's your reaction to that way of proceeding, Mr. Lammers? Any problem with that?

MR. LAMMERS: No, Your Honor. We'll do it any way the Court feels it's appropriate.

THE COURT: All right. And Mr. Spies, any problem with that?

MR. SPIES: No. I concur, and Mr. Pepper as well.

THE COURT: All right.

MR. SPIES: And Mr. Parrish.

THE COURT: All right.

MR. PARRISH: Yeah, I've gotten a sudden attachment, affection for the courtroom in Cedar Rapids all of a sudden.

THE COURT: And so that is a little unusual, but it [6] will save 350 miles for Mr. Pepper.

MR. PARRISH: Thank you, Your Honor.

THE COURT: All right. Then let's go ahead and proceed. I guess that the logical way to proceed is to see if there are any departure motions. And as you know, one of the issues that the Court faces is whether or not this Court is bound by the substantial assistance findings of the prior trial judge or sentencing judge. So that's a legal issue. And maybe the government has more – maybe there's been more cooperation since the last resentencing. I don't know the answer to that. So I'm going to let Mr. Lammers address that issue. And then, of course, we'll give defense counsel an opportunity to talk as well.

MR. LAMMERS: Thank you, Your Honor. First off, there has been additional cooperation. I don't believe based on the Court's prior ruling and my understanding of the case law that the Court cited and I think that we cited to the Court in our – I guess it would be first or maybe second sentencing memorandum. I'm not sure which number it was. I don't believe we can take up the additional cooperation at this point. I think we're bound to consider what he did at the time of the initial resentencings. So I can address that.

But we're not making any additional substantial assistance recommendation to the Court based on his additional assistance at this point. I believe that's properly handled [7] pursuant to a Rule 35 hearing. I don't believe we can do that till after, in fact, he's sentenced. So I don't know whether that's in front of the Court or you wish to address that or how you wish me to proceed in regards to that.

THE COURT: Let me ask you. Let's say we do the part 2 of this sentencing in Cedar Rapids and I sentence him. Is it the government's position that at that point after imposition that you would on that very day be ready to make your record on a Rule 35?

MR. LAMMERS: We certainly can.

THE COURT: All right. I guess that I'm not going to have you, if that's your position, make any further record as to additional cooperation if there's been any. I will wait to hear that at the Rule 35, or I will in my ruling say that you have to do it at time of

original sentencing. It doesn't seem to me that it really matters much since it's all going to be on the same day, but these learned defense counsels may feel differently. But I'm not going to make you make that record.

MR. LAMMERS: Thank you.

THE COURT: So I have gone over the transcripts of all the related cases where you detailed what each of these individuals did and made your recommendations to the prior judge. I'm inviting you at this time if you would like to to further talk about that. Or if you're happy with the record you've made at the other sentencings, that's fine.

[8] MR. LAMMERS: Again, I'll sort of with your permission at your pleasure. I don't need to take any more of the Court's time. A couple of those sentencing hearings that we talked about sort of detail, I was much more familiar with the facts of them since I think Mr. Pepper was originally sentenced some time ago, and those other defendants were sentenced some time ago.

I can talk I believe in detail in regards to Mr. Pepper's assistance. I'm very familiar with what he did in the case. I'm familiar with what Mr. Blankenship did in the case. I'm familiar with what Mr. Barragan-Torres did and Mr. Sandoval but not quite as in detail. I can certainly discuss with the Court what their assistance was if that's what you're asking.

THE COURT: Yes.

MR. LAMMERS: But I'd stand on the record in regards to those others.

In regards to Mr. Pepper, I can certainly stand on the previous record. We went – there's a very extensive transcript from –

THE COURT: Yes.

MR. LAMMERS: – both the first sentencing and the second resentencing, and I think we covered and outlined all of his assistance in pretty substantial detail. So unless you have specific questions, I don't have any objection to relying on the transcripts that the Court has at its disposal.

[9] THE COURT: All right. And do you think it is appropriate for me to not only consider the transcript and the record made as to this particular defendant's cooperation but to also consider the Blankenship, Barragan-Torres, Hamel, Perez, Sandoval cooperation?

MR. LAMMERS: I do think you can consider those. I believe that disparity is an issue that they have raised. I think the Eighth Circuit has addressed that issue. And while it didn't specifically foreclose the Court granting any type of variance on disparity, it did say there was no disparity to support a variance on the purposes of the record that it had in front of it – and the Eighth Circuit I believe at that point had both sentencing transcripts, and I'm referring now I think to both Pepper 2 and Pepper 3 – and

stated that a variance wasn't appropriate on those grounds or they didn't see a variance on those grounds. So I think the Court can consider that, and I think you can use the prior transcripts either in support of or in denial of a variance.

THE COURT: All right.

MR. LAMMERS: I don't anticipate actually any evidence to present to the Court today on those prior cases other than – and I realize it's not evidence – my own recollection and argument in regards to those particular cases.

THE COURT: All right. Thank you.

Mr. Spies?

[10] MR. SPIES: Thank you, Your Honor. We've reviewed the sentencing transcripts of the two prior Pepper sentencings. I'm not familiar with the transcripts in the other cases. but insofar as Mr. Pepper's cooperation is concerned, we don't have any additional record to present on that issue. And I discussed that with Mr. Pepper, and he too believes that the record made at the time of his prior appearances before Judge Bennett adequately explains both the depth and the importance of his cooperation and his assistance in the prosecution of others.

THE COURT: All right. And I understand from your sentencing memo it is your position that this Court must follow what Judge Bennett did.

MR. SPIES: It is our position, Your Honor, with all due respect to the Court's earlier ruling I think in July of last year on that issue where you asked Mr. Lammers and Mr. Pepper's prior counsel to brief that issue.

In the interest of consistency, even though that's the last refuge of the unimaginative, to the extent that we have argued that the Court can deviate from Judge Bennett's departure ruling and grant a greater departure under Rule 5K1.1, we retreat from that position.

And so we believe that it is the law of the case based on the Eighth Circuit's findings that Judge Bennett did not abuse his discretion. There were only two issues that were argued to the Eighth Circuit by Mr. Lammers or by the [11] government, and that was the departure and the variance. The Eighth Circuit found that there was no abuse of discretion on the departure issue. Therefore, we respectfully urge that is the law of the case. We've cited the authority on which we base that opinion and argument and have nothing in addition by way of evidence or argument on that score.

THE COURT: And I understood from your sentencing brief that you were going to make the argument today that if Mr. Lammers did not bring or suggest a further reduction for substantial assistance that you thought that was in bad faith.

Having heard his suggestion that – or his statement that when – after sentence is imposed the next

time we are together he intends to address that with the Court through a Rule 35 motion, is that satisfactory or do you still wish to pursue that issue?

MR. SPIES: No. It is satisfactory, Your Honor, and I appreciate you bringing that to our attention. We too after conferring with Mr. Lammers and with Mr. Pepper believe that that's the proper avenue for the Court addressing any assistance that came after sentencing. So to the extent that we've argued to the contrary in our memorandum, then we again withdraw that argument of bad faith.

THE COURT: All right.

MR. LAMMERS: If I could, I just – just for clarification's sake, I want to be clear that the possibility of [12] a Rule 35 motion is –

THE COURT: Possible.

MR. LAMMERS: Yes And I took that initially from the Court's comments, but I wasn't quite sure. I didn't want anybody to think that a Rule 35 motion would be made at the next – at the sentencing hearing but that it would be addressed at that hearing.

THE COURT: All right. So what you're saying is you would advise the court at that time of any further cooperation since the 40 percent was granted by Judge Bennett.

MR. LAMMERS: Correct.

THE COURT: Okay. Any cooperation that was not taken into consideration in reaching the 40 percent.

MR. LAMMERS: I would – assuming we make the 35 motion, yes.

THE COURT: Okay. So I maybe stated it a little too strongly, and that may change Mr. Spies' and Mr. Parrish's perspective on it.

MR. SPIES: Right. And I think that just to be absolutely abundantly clear, we don't foreclose renewing our so-called bad faith argument at the time of our sentencing in the event that the government chooses not to pursue a Rule 35, but we'll cross that bridge when we get to it.

THE COURT: All right. So you want to just hold that in abeyance rather than give it up.

[13] MR. SPIES: Yes.

THE COURT: That's fine with me. All right. Now let's go – unless there are any other departures, we'll go to variance?

MR. SPIES: We can go to variance, Your Honor.

THE COURT: All right.

MR. PARRISH: Your Honor, we would ask the Court to consider one thing. At some point – I would assume we won't have an allocution today.

THE COURT: Actually I was intending to.

MR. PARRISH: Oh. That's fine then.

THE COURT: Okay.

MR. PARRISH: That would be consistent with what I'd like the Court to consider, that when Mr. Pepper makes his motion – his – exercises his right to allocution that the Court would consider that as part of what we'd like the Court to look at in terms of the variance.

THE COURT: Very fine.

MR. PARRISH: Okay. Your Honor, I wanted to start – and I thought several times after looking at this case how I would start my argument with this Court.

I would like to go back a few years not in terms of the length of how I'm going to argue this case, but at one point in our state we were facing a meth-amphetamine addiction. It was one of the most difficult things that law enforcement, the [14] judicial process, defense lawyers, prosecutors had to face. And we also faced a period of what we called mandatory sentences which I vigorously opposed because – particularly in state court because it took out of the learned hands of the judges the ability to decide cases.

But yet in – as that process took place in the state, there were a few people who stood up and started what was called the drug court. And, Your

Honor, you took one of the front positions in that drug court establishment in the state of Iowa and took the lead role in going to Washington and establishing in Polk County one of those things.

And as I read this week an item that came out of the Washington Post that popped up on my screen that now the sentencing panel mulls alternatives to prison and now they're thinking about introducing as part of a guideline modification, if Congress allows it to stay in place, an alternative for prison for people who are addicted to drugs who get involved in the drug system and basically distribute the drug and are not violent offenders, to give federal judges now an alternative simply because they have seen the progress made in state court on these pilot programs that you were a part of.

That –

THE COURT: I think Judge Lay was also always an advocate for that in his dissents. Wasn't it Judge Lay?

MR. PARISH: I believe that's absolutely correct. In [15] fact, I argued in front of him over the years, and he's told me in terms of argument his position on those matters.

What I wanted to point out what I thought was significant, Your Honor, at that point when the rising tide was against that type of sentencing, you played a role in state court that has now become a model for success for young people who find themselves much

in the same position that Mr. Pepper found himself. Had he been in state court, Your Honor, where you were part of that pilot program, he would have been a model for what you tried to implement starting in Polk County that now has spread around the state of Iowa by these drug courts.

I say that to make one simple point. This gentleman who is sitting in front of you now is not the same person who sat in front of Judge Bennett for his sentencing several years ago. He's not the same person who in 2003 was involved in the methamphetamine drug trade.

Now, what does that allow you as a federal judge to do in terms of a variance? You know, I've struggled with this issue, and the reason I've struggled with it is because his case is so unique. His case is so exceptional.

I leaned over a couple of seconds ago, and I said, Mr. Pepper, what the judge has now proposed to do is something that is rare not only for you, Your Honor, but for any judge to say let's consider this because he sits in a situation perhaps that there is no other class out there in the United States that [16] will fit into his class. There will be no other equal protection people out there, due process people, that might sit in his position. And why? Well, for a couple of reasons, and this kind of is going to lead to my argument as to why we should cover a variance in this case.

When Judge Bennett made the decision in his case to impose the sentence that he did, he was pretty

frank, and the Eighth Circuit in discussing Judge Bennett's opinion discusses his frankness in saying, well, maybe I'm not doing exactly what the guideline is saying here, and I don't know whether it was Pepper 1 or Pepper 2, but the Eighth Circuit addresses that and says, well, Judge Bennett was pretty frank, and for that reason he knew at the time he was making the sentencing and not criticizing Judge Bennett that he was opening this issue up.

But also Gall was also kind of meandering through the court, and the Supreme Court at the same time they looked at Gall and the case that preceded Gall where the person was killed and they didn't take it also looked at Mr. Pepper's case and said, well, you know, there's a real issue out here. There's a real issue out here with Mr. Pepper's case, and we're going to allow the writ to be granted and in essence reversed it.

Now, that was the government's appeal of this matter. This was not Mr. Pepper doing anything to promote. What was Mr. Pepper doing in the process? Well, Mr. Pepper was out in prison in South Dakota. He was serving as a model prisoner. He [17] was going through the RDAP program doing everything he should have done. He was completing his program.

And what else was Mr. Pepper doing while this appeal was meandering through the system? He was getting employment. He was going to school. He was being a straight A student. He was complying with all the rules. He was getting exceptional

recommendations from the people who were supervising him. He was getting married. He was taking care of the full responsibility of a child And he was doing everything, everything that you would. have wanted a person back in your model Polk County court system to do to comply and get a deferred judgment.

And I have walked people through that deferred judgment program that – set up in state court that you established. So I have a good idea of the type people we want to walk through that program and to see if they could get rid of this meth addiction, get rid of this kind of trivial sale that promoted their own drug habits.

Well Mr. Pepper met that standard. In the process what does the law say to him? It says – and as Mr. Lammers says, we don't want disparity. And I agree, Your Honor. Disparity is perhaps not good for anyone in the sentencing process. But what if there's an exceptional case? What if there's a unique circumstance that Mr. Pepper finds himself in? And that's what we're struggling with right here. He is [18] exceptional. He is exceptional because a judge made a decision with regard to the case. He completed his 24 months he started. And he has now basically rehabilitated himself. And obviously there would be other conditions he'll have to meet to be completely rehabilitated.

But what does the law say to him? The law says, well, Mr. Pepper, there's such a thing as

post-sentencing variances – departure, variances that we can't accept, and this is why. It is because you put yourself in a position that separates you from the other class and create disparity. But does he really? And I think that's the question we ultimately have to answer. Does he really? We don't think so, and this is why.

If the Court – and we address it just briefly in our brief, Your Honor. If the Court says we can consider, as they did in the Jones case, variances for upward departure based upon conduct – and this is one of our arguments – based upon conduct that a defendant does after a plea and awaiting sentencing and says we're going to do an upward variance, is it fair not to consider a downward departure in terms of variance?

Give you one quick example. Couple of days ago in the paper a doctor who's serving a state court methamphetamine sentence saved a person's life. They gave him 30 days off because I looked at the sentence and said, oh, my God, what is 30 days going to do for this doctor, but he did.

And what we want to do is put people in positions [19] where they continue to comply. He had this case hanging over him, and he continued to comply, continued to conform, continued to rehabilitate himself, continued to do all the things we wanted him to do.

Should he get credit for that? Well, Judge Melloy seems to think perhaps in those cases we address in

our brief in a concurring opinion maybe we shouldn't cut it all off. Maybe we should have some opening for folks who fall into that special unique and exceptional circumstance.

We believe in this instance that this Court, Your Honor, based upon your experience, based upon the programs you've established, based upon what we think the law is at this point or does allow in terms of upward variance apply it to a downward variance in this case because it's so exceptional and it's so unique and it does have so many complexities to it that other cases don't have, and you may have to, say, separate Mr. Pepper out.

And what we believe you could do this on, Your Honor, is his continued compliance after the plea, his exceptional conformity in the prison system, his ability to not only follow through but stay in compliance by getting a job but not just doing okay, doing exceptionally well in school, by taking the responsibility of a job, by being in step to receive a promotion, and also by understanding that he does ultimately face over his head not just in terms of violating the terms of [20] supervised release but ultimately he has – he may have to walk back into court and be resentenced because a judge decided at that instance to change or move away from what the variance motions allowed.

So what does he have out there that's unique? We all have the anticipation as we wait for our clients for decisions to come down from the appellate court. But

in federal court we don't have a real class of people who sit out, who've been released from prison and have to go back.

And another thing that called my attention to it were these gentlemen who were police officers out in Boston the other week where the – I think the Second Circuit or First Circuit – I can't recall now – reversed their opinion. I immediately went and looked to see were they locked up or not locked up. Well, they'd been sitting in jail all this time while they were waiting on the appeal.

He's been out getting his life in compliance. So that stress, that anticipation, and watching him with his family earlier in the day and the tears and the fear and the stress coming out today sitting watching them and spending time with them one on one for the first time, you could see what they'd gone through. So that in and of itself makes him unique and may take him out of the category of disparity that exists within the other persons.

So we ask the Court to consider those factors. And [21] he'll talk about it when he does his allocution as to what he's been going through. So we'll ask the Court to consider that.

His continued cooperation, I understand what Mr. Lammers says about that, but we ask the Court to also take that into consideration but also the recidivism. And in that case, I believe the Jones case I believe is 2007 where they talked about Jones' recidivism being high, that might be something to

glom on to. His recidivism is low. So it does give me a tiny glimmer of hope that an appellate court in reviewing the reasonableness of it could glom on, Your Honor, to what you see as a low recidivism rate and allow him that opportunity. Even that tiny matter to glom on to would be enough in your opinion to salvage this case. The low recidivism rate compared to the high recidivism rate is something that the Court, we believe, could use for a variance.

And I don't want to get into the amounts of variance now at this point, Your Honor, but we believe that we have outlined in our brief – we believe once the Court considers the allocution statement and the other factors that we've presented in terms of exhibits that this Court will have a sufficient number of factors that it can consider to allow a variance, to allow Mr. Pepper to remain out complying with our society's orders and being a good citizen.

Your Honor, unless the Court has some specific questions on those, I believe we lay out those factors that we [22] would like the Court to consider, and I know we're relying on the Jones case, and I know we're relying on Judge Melloy who sat here who he says gives a lot of deference to the sitting district court judges.

And, Your Honor, we believe that based upon your experience, your background, and your wisdom you could comply – apply a standard in this case that creates a unique and exceptional category for Mr. Pepper and allow a variance. Thank you, Your Honor.

THE COURT: Are you then offering Defense Exhibits A through E?

MR. PARRISH: We are, Your Honor. Thank you.

* * *

(Defendant Exhibits A through E were offered.)

* * *

THE COURT: Any objection?

MR. LAMMERS: No, Your Honor.

THE COURT; Received.

* * *

(Defendant Exhibits A through E were admitted.)

* * *

THE COURT: Can I ask a question about the Defendant's Exhibit E, the transcript? Is – because I only have the front. I don't have the back. Is an IP an incomplete? I'm looking at fall 2008 or in progress maybe.

[23] THE DEFENDANT: Yes, it's – those are the classes I'm currently enrolled in.

THE COURT: All right. And what would a W be?

THE DEFENDANT: That's a withdrawal.

THE COURT: And an F is an F; right?

THE DEFENDANT: Yes.

THE COURT: Okay. All right. Mr. Lammers?

MR. LAMMERS: Thank you, Your Honor. I'm not sure if we're still proceeding to – I was given to understand that there may be evidence today from Mr. Pepper's father. I don't know if they intend to call him or not. If you're looking for a – I guess an introductory statement, if that's what Mr. Parrish was making, I don't have much to add. I would like to address the points that he made in argument after perhaps the Court's taken evidence. I think you have the issues pretty squarely before you. I don't think I need to outline them for you. If you're asking if I would like to address the points that he's made now, I'd be happy to do that, however the Court wishes to proceed.

THE COURT: All right. Do you have evidence that you're going to offer, Mr. Spies, Mr. Parrish?

MR. SPIES: Yes, we'll call Gary Pepper to the stand, Your Honor.

THE COURT: All right. Mr. Pepper, please come forward. Hello, sir. I'll just ask you to come forward and [24] raise your right hand, please.

GARY PEPPER, DEFENDANT'S WITNESS, SWORN

THE COURT: Please take the witness stand.

You may proceed.

MR. SPIES: Thank you.

DIRECT EXAMINATION

BY MR. SPIES:

Q. Mr. Pepper, for the record, please, will you tell us your name and where you live.

A. Yes, my name is Gary Pepper. We live in St. Joseph, Illinois.

Q. Mr. Pepper, we've seen from the transcript of your earlier appearance in court that you spoke on behalf of your son Jason and I believe also submitted to Judge Bennett a letter summarizing the changes in your life and in Jason's since his prosecution and sentencing. Am I right?

A. That is correct.

Q. All right. The last time you were in this courtroom was several years ago. Have you continued in the past several years to keep close touch with Jason?

A. Yes. Jason lives nearby where we live in St. Joe.

Q. And we got letters that have been introduced as exhibits about Jason's work at Sam's Club and his enrollment in school. Is Jason enrolled full time in school now?

A. I don't know if the course load is equivalent to a full [25] load, but I know he works full time at the Sam's Club, but he's continued every semester pursuing class work that adds to his degree.

Q. He's on supervised release to a probation officer in the Champaign/Urbana area?

A. Yes, ma'am – yes, that's true. He reports to some lady in the courthouse in Urbana.

Q. And so far as you know, has Jason complied with all that's been expected of him from his probation officer?

A. From everything Jason's told me – and I believe him – he has complied.

Q. Mr. Pepper, are you retired now?

A. Yes, sir.

Q. What was your work before you retired?

A. I was on the faculty of the University of Illinois.

Q. What did you teach?

A. I was in the crop sciences department. I did extension work as well as some applied research and classroom teaching as well.

Q. Mr. Pepper, I'm going to ask you, since you were last here in court, how has life changed by your observation for Jason?

A. Jason is moving forward with his career at a rapid pace at the Sam's Club. He started out in the parking lot pushing carts, and now he's helping to supervise the nighttime crew at the store there. His progress I – I guess I look at it and I [26] think it's above average in terms of how fast he's moving – moving forward in the ranks, so to speak.

He's, of course, in the last year taken on family responsibility. And he's doing great as far as I can tell. I know that there's challenges with a stepchild, and he has a stepdaughter, and things appear to be really better than I would have ever hoped a stepchild relationship could be.

I'm happy with his family situation. I'm happy with his school progress. I'm happy with his career that he's trying to pursue at the Sam's Club. I think he's in every way a success.

Q. Now, we've also heard and, of course, the record is pretty abundant about Jason's transformation from a drug addict to a person who's clean.

A. Uh-huh.

Q. Has the attitude that got him there continued from your point of view?

A. No, I think he did a lot of growing up when he was in prison. And, of course, getting away from

the drugs cleared his mind. That helped to change his attitude. But I think the program that he went through, the drug rehabilitation program at Yankton, really opened his eyes and got him on to the right track. He had a – well, he was mixed up. I know that many teenagers are when they get to be high school graduates. They're very, very intelligent. And a few years later they find [27] out they're not quite so smart.

But the direction he was going as soon as he left high school was of great concern to me and my wife, and it led to tragedy in a sense. But now he's turned his life around. I think he got a real education at Yankton, and I'm very, very happy he had that opportunity.

Q. Does it change your relationship to Jason?

A. Yes, sir, yes, sir.

Q. How so?

A. When he left home after high school graduation, we basically had no relationship. We've rebuilt a relationship since he went to prison. I guess it started when we went to visit him in prison, but since his release, it's a different relationship than I had with him as a teenager in high school.

Q. I understand. Mr. Pepper, what does Jason see about his future?

A. Well, I see him moving into the management program, management trainee program, at the Sam's

Club, and from what he's told me, he could do that possibly as early as next January, begin the trainee program. And he's certainly smart. He's a hard worker, and I can see him fitting into the Sam's Club program quite well.

MR. SPIES: Thank you, Mr. Pepper. Those are all the questions I have for you.

THE COURT: Cross?

[28] MR. LAMMERS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. LAMMERS:

Q. Mr. Pepper, just I guess for purposes of clarification, you referenced teenagers not thinking they know everything and then realizing a few years later that they don't know as much as they thought. Is that a correct summary of what you said?

A. That's my personal observation. I've heard it from other parents as well.

Q. It's kind of based on a Mark Twain quote, isn't it?

A. I don't know. I honestly don't.

Q. Well, anyway, he wasn't a teenager at the time he was arrested, was he?

A. I'd have to do the arithmetic.

Q. Would it surprise you to know he was 24 at the time he was arrested?

A. Okay, yeah.

Q. In fact, at the time of his first sentencing hearing, he was just about 25.

A. Okay.

Q. Does that sound right?

A. Well, he's 29. He's 29 now.

Q. I'm not trying to trick you. I just wanted to make the point I guess that he wasn't a teenager when he was alleged to have committed these crimes, was he?

[29] A. No, sir. I had essentially no relationship with him from the time he graduated from high school because he left.

MR. LAMMERS: All right. That's all the questions I had. Thank you, sir.

THE COURT: Anything else for this witness?

MR. SPIES: No, Your Honor. Thank you.

THE COURT: Thank you, sir.

Further evidence?

MR. SPIES: Only one matter of clarification, Your Honor. We in our prehearing filings indicated that we were going to be offering an Exhibit F

which was correspondence from a representative or representatives from the federal Bureau of Prisons. As I reported to the probation staff, we were not able to get any correspondence, and it went to the issue of Mr. Pepper successfully completing the RDAP program at Yankton and whether he did. We know he did not receive any sentencing reduction by virtue of that, and the issue that we were trying to address and prepare to address for the Court today was whether or not if he were sentenced to additional time in prison whether he would be eligible for any sentencing reduction by virtue of having completed RDAP while he was there at Yankton.

We never got a consistent answer, so we're not prepared to address that. I understand the probation staff has made some efforts as well, and if we do get any answer, we'll furnish it to the Court and counsel.

[30] THE COURT: All right. Any further argument from defense counsel on their motion for variance?

MR. PARRISH: No, Your Honor. Thank you.

THE COURT: All right. Mr. Lammers, I'm ready to hear from you.

MR. LAMMERS: Thank you, Your Honor. If I could, I'd just like to briefly address a couple of the points made by Mr. Parrish, one of which – I think he started out with a reference to the drug court. And Your Honor and Mr. Parrish would certainly have

more knowledge of how that functions than I do. I had a little experience in state court as a prosecutor in Black Hawk County, and we looked towards possibly implementing drug court, and I went to a training in Kansas City where we looked at their model and how their model worked.

And one of the foundations of the drug court was that folks who were drug addicts and maybe committing some types of smaller offenses, they'd take a look at the underlying addiction that maybe went to some of the issues. By – and again, I don't know what they did in Polk County. But by sort of the parameters of the program they were thinking about in Black Hawk County – and I don't know whether they implemented that program either – Mr. Pepper never would have qualified.

THE COURT: No.

MR. LAMMERS: That program was unavailable for people who were selling large amounts of drugs, and I think it was [31] unavailable for people who were standing on the street corner selling drugs.

THE COURT: It was unavailable in Polk County for any drug dealer or anyone who had violence in their background.

MR. LAMMERS: And I'm not alleging Mr. Pepper has violence, but by any record – and Mr. Parrish and Mr. Spies have referred to Jason Pepper as a drug addict. I'm sure that's true. I have no

reason to doubt it. In fact, he told us he was a drug addict at the time of his arrest, and he maintained that all the way along. True.

He was also a drug dealer, and I think Mr. Parrish used the phrase – I wrote it down at the time – for these trivial drug offenses. There is nothing trivial about Jason Pepper's drug offenses. Jason Pepper was involved as a drug dealer, and he had two separate sort of conspiracies that he dealt with. Alex Blankenship dealt with – I believe it was Felipe Sandoval and maybe Mr. Barragan-Torres. Barragan-Torres was the source. Felipe Sandoval was the guy that was getting it from Mr. Barragan-Torres. He was delivering it to Alex Blankenship and Jason Pepper, and through them they distributed a significant amount of methamphetamine. They're getting approximately an ounce of methamphetamine at a time.

Jason Pepper also had another source, and that is where Steve Hamel and Lorrie Perez come in. And at the time of the last sentencing hearing when Mr. Pepper was on the stand, he [32] admitted he knew Lorrie Perez was a multiple-pound drug dealer. She was receiving multiple pounds at a time and selling them. And I think, in fact, there's a question in that colloquy where I asked Mr. Pepper if he was aware that she might have brought something like a hundred pounds of methamphetamine into the community. And I don't think he knew that she had brought that much, but he acknowledged that she was a large-scale drug dealer. And she was. And he says – I think the PSIR indicates that he was present

when she had approximately two to three pounds of methamphetamine. So there's nothing trivial about Mr. Pepper's offenses. So I guess I just wanted to take issue with that in regards to terms of the variance.

And I do also want to address I guess what Mr. Parrish said about how well Mr. Pepper has done since the sentencing, and that's the important part, since the sentencing. The Eighth Circuit has categorically said you cannot consider his post-sentencing rehabilitation. You can't consider those for terms of a variance. It said it in Pepper 2. It said it in Pepper 3 on – after it was returned from the Supreme Court to look at in the light of Gall. It was said in McMannus. It's said in – I think the other case or the first case to address it is Jenners. The Court simply can't do that.

And while it appears creative to try and say look at this in a different context, he's separated out from other defendants, he's different from other defendants, disparity, [33] what he's really asking you to focus on, Your Honor, is his post-sentencing rehabilitation, and you're specifically precluded from being able to do that.

So they raise it in other circumstances I think in their sentencing memorandum. I think they cite to youth. Again – and that's one of the points. He wasn't an 18-year-old kid right out of high school who sold a little bit of methamphetamine on one occasion. This is a 24-year-old man who decided to get involved with a large-scale drug conspiracy. Youth is an inappropriate ground to base a variance on on these facts.

The Court has discretion to determine whether or not a variance is appropriate. I'm not gainsaying that or trying to deny that in any way. My point simply is – I was actually at the back of the last sentencing hearing, and I think youth was raised in that one as well, and I thought Mr. Fairchild addressed that well. He said it's limitless. It's limitless. So if we say 18 years old, you're young, therefore, you get a variance, 20, well, that's young too; therefore, you get a variance. I mean, where do you stop? Where does youth stop, and then at what point do we transition into actually, well, look at the fact that this is an older person who may have aged out of criminal activity and, therefore, deserves a variance? It's so elastic as to almost be without meaning. So you can consider that for what it's worth.

[34] Drug addiction I think was another factor that the defense listed in their brief. And in regards to drug addiction, I think there's a case United States versus Lee. That says that an extraordinary – or drug addiction -- excuse me, a variance for drug addiction can't be given unless the Court finds extraordinary circumstances. I don't think that language necessarily survives after Gall. I don't think you are required to find extraordinary circumstances since Gall. But you still need to take a look at that and see whether drug addiction supports a variance in this particular case.

I would urge the Court to look at the fact that Mr. Pepper by his conduct actively encouraged the drug addiction of others. He's not standing over them

and forcing them to take drugs. However, he sold drugs – and again, I refer you back to the second sentencing transcript – by his own admission to between 10 and 15 separate customers that he was personally providing the methamphetamine to.

So he participated in continuing the addiction of others. Drug addiction as a factor can certainly be seen as a mitigator, but it certainly can also be seen as an aggravator. You can say that crimes are committed at a higher rate based on drug addiction. So I'd urge the Court to deny a variance on those grounds as well.

There were a number of other grounds listed I think in the sentencing memorandum by defense counsel. A lot of them [35] actually are – they're not separate. They're really post-sentencing rehabilitation. I think they refer to a dozen specific grounds, and I think that's on page 2 to 3 of the r – of their sentencing memorandum, the bottom paragraph.

Age I think we've addressed.

Lack of criminal record, that's another one that I'd like to touch on briefly. Lack of criminal record was addressed by the Eighth Circuit in this particular case because I think Judge Bennett in the first sentencing sort of referred to it and then also referred to lack of violent criminal history, and the Eighth Circuit said, well, that's taken into consideration. He got safety valve because of his lack of criminal record, and so that's considered. Again –

THE COURT: And the lack of violence.

MR. LAMMERS: Exactly. And, in fact, I think the Eighth Circuit was more specific on the lack of violence. They said really all that is is a way to try and shoehorn lack of criminal history into an appropriate ground for a variance. Again, I think the Court can consider these things. I don't think you're precluded under Gall. I think that you have more discretion. Whether it's appropriate or not I leave to the Court. I would submit that it's not.

Number 5, extraordinary and genuine post-offense and sentencing rehabilitation, let's deal with those – because they're really two separate factors, post-offense rehabilitation [36] and post-sentencing rehabilitation. Post-sentencing rehabilitation is specifically precluded. I don't believe the Court can consider it. We've already discussed that. I think the case law is clear.

Post-offense rehabilitation the Court can consider. It couldn't consider it under the old mandatory guideline schemes unless it was to an extraordinary degree and outside of the heartland. You can consider it now.

But let's take a look at post-offense rehabilitation. He went into custody the night of the arrest. He stayed in custody after the night of the arrest until he was sentenced and went to prison, and then he completed the RDAP program. That's all post sentencing.

So really what he did is he sat in a county jail between arrest and sentencing. I don't know how you can base a variance on the fact that he didn't use drugs. He didn't have the ability to since he was in jail at the time. There really is no meaningful post-offense rehabilitation. There may be meaningful post-sentencing rehabilitation, but again, you're precluded from considering that.

The drug addiction I think that we've gone – we've gone over that as well.

Disparity, I think there's a – I think that record is before the Court in the transcripts.

The cost of incarceration, I just want to touch base [37] on that briefly. I don't think that this – and the Court makes the determination obviously, not me, not defense counsel. I don't know that that's an appropriate consideration for the Court to take a look at. I think that's more properly a decision of Congress. If Congress has a problem with the amounts of money that people are spending or that the courts are spending – or excuse me, BOP is spending, they can then decide to adjust the sentencing guidelines to take care of mandatory minimums or remove mandatory minimums.

I don't think the Court should get into the business of saying, you know, I'm going to make some sort of a policy determination here and give defendants variances because we're spending a lot of money for – to incarcerate them. I just don't believe that's an appropriate consideration and would request that the

Court not take that into consideration in regards to a variance.

In regards to number 8 – I believe that's on the top of page 3 – exemplary behavior on supervised release, again, that's simply another way of referring to post-sentencing rehabilitation.

His continued cooperation, I think that's properly before the Court at the next hearing. I don't think that's properly before the Court at this particular time. I think we can address that additional assistance either through a Rule 35 or they can make the argument perhaps at that point. I think [38] they've reserved the argument and we'll take it up at that point.

Remorse, I believe that's addressed within the – within the acceptance of responsibility.

His family obligations and what is just I think are the last two. Family obligations, again, that's simply post-sentencing rehabilitation.

And as for what is just, you can't simply look at this as a one-way ratchet, and oftentimes you'll hear defense counsel come in and they'll outline these are all the mitigating factors. But you don't just look at the mitigating factors under 3553(a). You look at what an appropriate sentence for the severity of the crime is. You look at what the actual crime itself was. You look at the fact that he was a fairly significant drug dealer for a fairly significant amount of time.

Yes, you take into consideration the fact that he doesn't have any criminal history, but again, that's already addressed under the guidelines. Yes, you take into consideration the – I guess the totality of his personal life and his personal history. But you also look at the need to promote respect for the law and to recognize the seriousness of the offense and deterrence. So it's not simply, again, a one-way ratchet that only goes towards mitigation. It's all of the factors that need to be taken into consideration here.

In regards to – I guess there was one more point. [39] Well, I think the Court has the issue pretty squarely in front of it at this particular point. Mr. Pepper has done well on supervised release, and I think Mr. Parrish outlined that nicely.

Let's not forget he's also required to do those things on supervised release. As part of his supervised release, he is required to be employed. He is required to not have a dirty UA, to not commit any other law violations. He's required to do those things. He did them and is to be commended for them. But that is, I guess, what he should be doing. That's what every defendant should be doing because at this point we don't measure him on supervised release or when he's out under the supervision of the Court. We don't measure him by the standard of other law violators. We measure him by the standard of society at large. If you want to do well, you get a job. If you want to do well, you go back to school. You take care of your family obligations. He's doing what he is supposed to be doing.

So I just don't – I just don't believe a variance I guess in this particular case is appropriate. But again, that's the Court's decision and it's to the discretion of the Court. And beyond I guess addressing any questions the Court may have, I don't think I have anything else to add.

THE COURT: Thank you.

Mr. Parrish, do you want to respond?

MR. PARRISH: Briefly, Your Honor, I'd like to [40] respond.

I didn't mean to get into an argument about the merits of the Polk County system, but I wanted to at least set a record about the history that this Court I know has and the commitment that this Court has had to assisting people who've had drug problems. That's kind of gone against the tide which is kind of the issue that the people in the United States are saying now there are 2.5 million people in prison and many of them nonviolent drug offenders. We have to do something to go against the tide again on who fits in that category.

I don't want to talk about the Black Hawk County program because I have some real bias as to what goes on up there. But I do want to address what I know from Polk County and what exists. And I may have misspoke with regard to the trivial nature, and I want to make it absolutely clear.

Number one, I don't think Mr. Pepper has ever come in and said his drug dealing was trivial. He

accepted responsibility. He got the reduction for it. He also got the report written by the presentence report that said 24 months is what this young man ought to get, and he cooperated. And Mr. Lammers has already said, look, I'm going to look at it again for Rule 35. So we know the type information he has to be able to provide in order to get that.

But what I mean in the whole context of Gall, Pepper, and what has happened, the judicial system is saying let's take [41] a look here. He has been a person who has been the precipitator of that look both by the government in its appeal and by the Gall case coming out with the Supreme Court saying, folks, take a look back down at what's going on here, and based upon what's happening with the panel that we are going to take a look at, maybe there ought to be something out there a little bit different than what we're doing as opposed to putting everyone in prison.

The only other comment I want to make to what Mr. Lammers says, sure, we want everyone to comply. There's no doubt about it. But not only has he complied, he's excelled. Not only has he had a job, he's excelled at that. Not only has he been in compliance, but he had no incidents.

The incident I wanted to point out with regard to the Jones case and to what we say we could glom on as a factor of recidivism, aren't those factors that we want and based upon his unique circumstance which Mr. Lammers did not address, he did not address the fact that the government appealed and he continued

to comply, not only comply but excelling, those are the factors that create the unique category that he may not have a class of people that we can talk about disparity in. And maybe he's exceeded the standards that we look back at these folks who are in his same category of the six or seven people that you mentioned. Maybe there is something unique that you can carve out in his instance to grant him a variance.

[42] And those are the issues I think Mr. Lammers – he's talking about the traditional factors. This is not a traditional case. Mr. Spies and I and Mr. Pepper and Mr. Lammers wouldn't be sitting here and this incident happening in 2003 if it was an ordinary case, Your Honor. It is not an ordinary case. Mr. Lammers knows that. I think he recognizes it. He recognizes it in the fact – in saying what Mr. Pepper has done well. There's not anyone who's part of the judicial process who could come in and say Mr. Pepper's case, three times before the Eighth Circuit, twice before the Supreme Court, once with a grant of a writ of cert., can say Mr. Pepper is an ordinary, usual case that flows through the system. It is not.

And consequently, that's what we're going to have to address. That creates the variance. That is the variance that we believe is acceptable, that would be reasonable, and these are factors you can consider in your ultimate decision.

THE COURT: Thank you.

MR. PARRISH: Thank you.

THE COURT: Do you want your client to have his right of allocution at this time or now and then perhaps also later? What would you like?

MR. PARRISH: Your Honor, we've discussed this. We believe Mr. Pepper wants to address the Court at this time. We believe under the circumstances and outline of this case it would be an appropriate moment. He may want to make some [43] closing comments once we get to Cedar Rapids, but I believe this is the appropriate time, and we want the Court to consider his statements as part of the evidence to consider for the variance.

THE COURT: All right. And do you want to call him as a witness?

MR. PARRISH: Just the right of allocution I think would be appropriate, Your Honor.

THE COURT: All right.

MR. PARRISH: We've briefed him on what – how that operates in the courtroom, not what to say but how it operates in the courtroom.

THE COURT: All right.

MR. PARRISH: Thank you.

THE COURT: Mr. Pepper, now is the time in the proceeding when you have an opportunity to speak. You are not required to speak, but I'm willing to listen to anything you'd like to tell me.

THE DEFENDANT: Your Honor, I've given a lot of thought to being in prison for many years now and have thought about it as a blessing that it happened because I feel like I had two options, and the other being that I would be dead today.

I feel like it was at the time in my life the best thing that could have happened to me to be arrested, to be put out of the environment that I was in, to learn about why I was so addicted to drugs, to deal with losing my mother and my [44] brother so early life. All of those things that I got to deal with in prison I am grateful for today, and I feel today my success could not have happened. As I said before, I feel like if it wouldn't have happened that way I would be dead on this very day.

So I appreciate the second chance that Judge Bennett gave me when I was originally sentenced. I took full advantage of it I believe. And I know that methamphetamine's ruined my life. It almost took my life. And like I said, I am grateful for the opportunity to be standing just before you today alive, to be able to go back to school, further my education, to be excelling at my current role at Sam's Club as a supervisor for the night crew, to look forward to a possible – a very good chance I would say at a promotion to management in January to start the management-in-training program.

So I – I guess I just want you to know that I feel like I've taken full advantage of the opportunity that Judge Bennett gave me originally, and I am just

trying to live my life the way that it should have been being lived years ago when this happened.

I do – Mr. Parrish was just letting me know that I do have a family, newly acquired wife. We were married May 19 not of this year but a year ago. I do take care of what is her child as my own. She – I am the only father that she has ever known, and she, as far as my knowledge goes, doesn't know that I [45] am not her real father. As far as she's concerned, I am.

I never I guess would have imagined that my life would be where it is today back when I was, you know, strung out on meth, that I was doing admittedly horrible things that I should have never done, made bad choices. But I understand those choices, the reason I was making them. It ultimately was my choice to make them. I feel like I have been rehabilitated. Prison has done its job I guess you could say in my case. And that's really all I can say about it.

THE COURT: All right. Thank you.

All right. Any further evidence or argument relative to this resentencing from defense counsel, either Mr. Spies or Mr. Parrish?

MR. SPIES: No, Your Honor, only to the extent that, as I said, if we receive any communications from the Bureau of Prisons within the next week or so, we would ask the record be open for that limited period of time to submit any findings

about the RDAP program and its implication for Mr. Pepper should he be resentenced.

THE COURT: All right. Mr. Lammers, any further argument or evidence that you'd like to present today?

MR. LAMMERS: No, Your Honor. I do wish to address the RDAP program. I've been in touch with Mr. Berry from my office. He's been in touch with BOP. He has spoken with – and I don't know the name of the person he spoke to. I think it was

* * *

[Reporter's Certification Omitted In Printing]

DEFENDANT'S EXHIBIT A

[LOGO]

10/10/2008

To Whom It May Concern:

In my 12 years of being with Sam's Club I have never had to speak on someone's behalf as far as character. There are very few and far between that would even hit my expectation of being a positive change maker. However . . . I have had the privilege to work with Jason Pepper for the last 2 years here at Sam's Club and I would stand behind him for any occasion. Jason has communicated that he has made some mistakes in the past. Our culture is to work with people where mistakes are a part of learning. Jason has proven that he understands what needs to be done in order to raise a family and be a good citizen in the community. In our business we select associates monthly for their achievements in and out of the club. Jason had not only received a monthly award, but was our associate of the year for 2007 (we employ 197 associates in our club). It seems quite disappointing to know that he could spend time away from us when he is only a foothold away from being a manager in our company – we were ready to promote him in January of 2009. I can't turn my head to what he had done in the past, but I believe he has been accountable for his actions since. He has also demonstrated that he wants to be the best! The biggest "mistake" we could make today is stop the

momentum of this individual's future. I can only hope you make the right decision.

Sincerely,

/s/ Timothy E. Beckman
Tim Beckman
Sam's Club Manager
217-355-2223 work
217-390-3698 cell

DEFENDANT'S EXHIBIT B

October 14, 2008

To Whom It May Concern:

I am writing this letter on the behalf of Jason Pepper. Jason is currently my night team leader at Sam's Club in Champaign, IL. Being a team leader, Jason is second in charge on nights and is the highest level associate one can be as an hourly associate. Jason is responsible for writing evaluations for all the other associates on nights, making sure the store is ready for opening at 7 a.m., and making sure that all merchandise is out for sale for our members. Jason has expressed his interests in becoming a manager at Sam's Club, and with him only being with the company for just a few years he is on the fast track to make that dream become a reality. Even with Jason currently enrolled in school, he can be counted on to be at work when he is supposed to and to complete his job duties on a regular basis. I understand that Jason has had issues with the law in the past, however in my opinion it would be a waste of a young

man's life that is on the right track to become a positive influence for other young men that have had issues with the justice system. I feel that if Jason does not end up being incarcerated he will be in the manager training program within the year, that's how much confidence that I have in Jason. In final, I just hope that Jason can follow his dreams and become a positive contributor to society, which I know he can and will be.

Sincerely,

/s/ Tobias A. Ledford
Tobias A. Ledford
Overnight Assistant Manager
Sam's Club Champaign, IL
Tel: 765-713-9094
401 W. Curtis Rd. Apt. 9-101
Savoy, IL 61874

DEFENDANT'S EXHIBIT C

Friday, October 10, 2008

To Whom It May Concern,

I am writing this letter on behalf of Jason Pepper. As my friend, Jason is a great person. He is a good friend. He has a great positive attitude. He always has a smile on his face, and always tries to put a smile on your face. There is no doubt in my mind, that if I ever needed help with a personal situation. He would step up and offer his help.

As a coworker, Jason is a team player. He is always helpful, and considerate. He is a good leader, and strives to be the best he can be at his job. Without fail he puts in 110% everyday at work.

Jason, in my opinion has turned his life around for the better. He is currently going to school, to further his career. He has a wife and daughter who love him very much. Jason in my opinion is valued member of society. I think it would be a mistake to put him back in prison. He has made his mistakes in the past. He has proven he has learned from them by not committing them again. I believe in second changes for those who deserve them. Jason deserves his second chance.

I thank you for your time, and a chance to let my voice be heard. Please feel free to contact me at any time regarding Jason Pepper.

Sincerely,

/s/ Scott Lamboley
Scott Lamboley
2704 County Road 2050 N
Ogden, IL 61859
(217) 583-3174

DEFENDANT'S EXHIBIT D

Parkland College
Grades – 2008 FALL
Pepper, Jason A

Section ID	Title	Credit Hours	Midterm Grade	Final Grade
ECO 101-944	PRIN OF MACRO ECONOMICS	3.0		
MGT 112-050	HUMAN RSOURCE MANAGEMENT	3.0	A	
MGT 113-940	HUMAN RELATNS/ WORKPLACE	3.0	B	
MKT 101-941	INTRO TO MARKETING	3.0		

2008 FALL GPA: 0.000
Cumulative GPA (thru 2008 FALL): **2.190**
Degree: **ASSOCIATE IN GENERAL STUDIES**
Major: **GENERAL STUDIES**
Academic Standing: **GOOD STANDING**

2400 WEST BRADLEY AVENUE
CHAMPAIGN, ILLINOIS 61821-1899
GENERAL INFORMATION 217/351-2200
WEBSITE WWW.PARKLAND.EDU

DEFENDANT'S EXHIBIT E

Name Jason A Pepper
Student Number: XXX-XX-7124 DOB 04-30-1979

PARKLAND COLLEGE
2400 W. Bradley Avenue
Champaign, Illinois 61821-1899
(217) 351-2200

ACADEMIC RECORD

THE WORD COPY APPEARS WHEN PHOTOCOPIED
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COURSE NUMBER	COURSE TITLE	GRADE	CREDIT HOURS	QUALITY POINTS

Official ACADEMIC RECORDS

Secondary Schools:
ST JOSEPH-OGDEN HIGH SCHOOL Graduated May 1997

Higher Education Institutions:
WESTERN IOWA TECH COMMUNITY COLG Aug 2005-May 2006

Current Academic Program
CONTINUING EDUCATION
ASSOCIATE IN GENERAL STUDIES
Major: GENERAL STUDIES

Transfer Credit Applied to 2006 FALL
WESTERN IOWA TECH COMMUNITY COLG Aug 2005-Dec 2005

INTRO TO COMPUTERS		3 00
COMPOSITION I		3 00
DEV MATH/NO CREDIT		0.00
INTRO TO PSYCHOLOGY		3 00
	Jan 2006-May 2006	
COLLEGE ALGEBRA		4.00
INTRO TO SOCIOLOGY		3.00
School Total:		16.00

----------2006 FALL----------

Admitted Program
CONTINUING EDUCATION
ASSOCIATE IN GENERAL STUDIES
Major: GENERAL STUDIES

ENG - 102	COMPOSITION II	W	(3.00)		
HIS - 101	HIST OF WESTERN CIV I	C	4.00	8.00	
PHI - 103	INTRO TO PHILOSOPHY	B	3 00	9 00	

	AHRS	EHRS	OHRS	OPTS	GPA
Current	10.00	7 00	7.00	17 00	2.429
Cumulative	26.00	23.00	7.00	17 00	2.429

COURSE NUMBER	COURSE TITLE	GRADE	CREDIT HOURS	QUALITY POINTS

----------2007 FALL----------

AST - 101	THE SOLAR SYSTEM	C	4 00	8 00
ECO - 101	PRIN OF MACROECONOMICS	W	(3 00)	
ENG - 102	COMPOSITION II	W	(3 00)	
MAT - 143	CALCULUS/BUS & SOC SCI	W	(4 00)	

	AHRS	EHRS	OHRS	OPTS	GPA
Current	14 00	4 00	4.00	8 00	2 000
Cumulative	47.00	34 00	18.00	46.00	2 556

----------2008 SPRING----------

ACC - 101	FINANCIAL ACCOUNTING	W	(4 00)	
BUS - 204	LEGAL ENVIRNMNT-BUSINESS	W	(3 00)	
HUM - 109	CULTURAL VALUES/S ASIA	F	(3 00)	

	AHRS	EHRS	OHRS	OPTS	GPA
Current	10 00	0 00	3.00	0.00	0.000
Cumulative	57.00	34 00	21 00	46.00	2.190

----------2008 FALL----------

MGT - 112	HUMAN RESOURCE MANAGEMNT	IP	(3.00)	
MGT - 113	HUMAN RELATNS/WORKPLACE	IP	(3.00)	
MKT - 101	INTRO TO MARKETING	IP	(3.00)	

	AHRS	EHRS	OHRS	OPTS	GPA
Current	9.00	0.00	0 00	0 00	0 000
Cumulative	66.00	34.00	21 00	46.00	2.190

----------CONST. REQUIREMENT MET BY HIGH SCHOOL COURSE WORK----------

----------End of ACADEMIC RECORDS----------

2007 SPRING

BUS - 101	INTRO TO BUSINESS	B	3.00	9 00
HIS - 102	HIST OF WESTERN CIV II	B	4.00	12 00

	AHRS	EHRS	OHRS	OPTS	GPA
Current	7.00	7 00	7 00	21.00	3 000
Cumulative	33.00	30.00	14.00	38.00	2 714

No Further Entries This Column

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Michael D. Henry, Director
Admissions and Enrollment Management

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10-14-08

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----------2007 SPRING----------

BUS - 101	INTRO TO BUSINESS	B	3.00	9.00
HIS - 102	HIST OF WESTERN CIV II	B	4.00	12.00

	AHRS	EHRS	OHRS	OPTS	GPA
Current	7.00	7.00	7.00	21.00	3.000
Cumulative	33.00	30.00	14.00	38.00	2.714

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10-14-08

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff,	)	CR 03-4113
VS.	)	**VOLUME II**
JASON PEPPER, Defendant.	)	

APPEARANCES:

ATTORNEY JOHN H. LAMMERS, Assistant U.S. Attorney, 600 4th Street, Suite 670, Sioux City, Iowa 51101, appeared on behalf of the United States.

ATTORNEY LEON F. SPIES, of the firm of Mellon & Spies, 312 East College Street, Suite 216, Iowa City, Iowa 52240,

AND

ATTORNEY ALFREDO PARRISH, of the firm of Parrish, Kruidenier, Dunn, Boles, Gribble, Cook, Parrish, Gentry & Fisher, 2910 Grand Avenue, Des Moines, Iowa 50312-4297, appeared on behalf of the Defendant.

CONTINUED RESENTENCING HEARING,

held before the Hon. Linda R. Reade on the 5th day of January, 2009, at 4200 C Street S.W., Cedar Rapids, Iowa, commencing at 11:00 a.m.

Patrice A. Murray, CSR, RPR, RMR, FCRR
United States District Court
4200 C Street S.W.
Cedar Rapids, Iowa 52404
(319) 286-2324

[52] THE COURT: The matter before the Court is United States of America versus Jason Pepper. This is criminal number 03-4113. Mr. Pepper is here with his attorney, Mr. Spies, and – attorneys, Mr. Spies and Mr. Parrish. Assistant United States Attorney Jack Lammers represents the United States.

I see Supervising Probation Officer Todd Huss here. Are you here instead of Mr. Zach today?

PROBATION OFFICER: That's correct, Your Honor.

THE COURT: Thank you. And I know that you're familiar with the facts and circumstances of this case.

PROBATION OFFICER: That's correct, Your Honor.

THE COURT: All right. The record should reflect that this is a continuation of the sentencing hearing that was begun October 17 in Sioux City. And since that hearing, the Court – and at that hearing, the Court gave the parties an opportunity to present evidence and argument. And then the Court issued a sealed sentencing memorandum, and that was filed just [53] before Christmas as Document 198 – 198 in the records of the court. The Court, I think, in the memorandum addresses the sentencing factors at 18 United States Code Section 3553(a). And the Court has determined that the appropriate sentencing

range is 77 to 97 months, finding that a within-the-guideline sentence is appropriate.

I am aware that also since the hearing, and quite recently, the government has filed a Rule 35(b) motion, and I'm not going to ignore that. We'll take that up after the sentencing. We will complete the sentencing, I will issue my ruling, and impose the sentence. I'll ask Probation to prepare a judgment based on the Court's sentencing decisions. And then we'll take up the Rule 35(b) motion. And then I will ask Probation to, if appropriate, file an amended judgment. In other words, I want the Circuit to see the judgment, and then the amended judgment after the Rule 35(b). So it's a little odd, but as long as we're all together, I think it's appropriate to hear the Rule 35(b).

Is that all right with you, Mr. Lammers?

MR. LAMMERS: Yes, Your Honor.

THE COURT: Mr. Spies, Mr. Parrish, is [54] that all right?

MR. SPIES: That's acceptable, yes.

MR. PARRISH: That's fine.

THE COURT: All right. Very fine. I think it will just make a less confusing record. So the parties now have an opportunity to argue where within the range of 77 to 97 months is appropriate. And again, at this point, I don't want to hear argument on the Rule 35(b) motion. I'll hear that later.

Mr. Lammers.

MR. LAMMERS: Thank you, Your Honor. Your Honor, at this time we would simply request that the Court exercise its discretion in determining where within the range is appropriate.

THE COURT: All right. Mr. Parrish, Mr. Spies.

MR. SPIES: Thank you, Your Honor. We're, of course, mindful of the Court's ruling on all the, I guess for lack of a better term, substantive issues that you addressed in your written ruling. The polestar, of course, is what is sufficient but no greater than necessary to impose an appropriate sentence here. If the Court felt constrained by the guideline range, plainly,

* * *

[67] THE COURT: Anything else, gentlemen, then, before I make the findings on the range – within-the-range sentence?

MR. LAMMERS: No, thank you, Your Honor.

MR. SPIES: Nothing else.

MR. PARRISH: No, thank you.

THE COURT: All right. The Court, for the reasons stated in the sentencing memo, is going to sentence at the bottom of the range of 77 to 97 months. And I know you know this, Mr. Pepper, but after the sentence is imposed, the Bureau of Prisons

will go back and compute credit against that 77 months. So you don't have 77 to do. You'd be given credit for the time you already served on this sentence. I am going to make a recommendation to the Bureau of Prisons that you get credit against your sentence for completion of the Residential Drug Abuse Treatment Program, according to their guidelines. I don't know how many months that would be, if any. Maybe you wouldn't earn any time off your sentence. I don't know. It's up to them. But I'm going to recommend that they give you that credit.

Also, on the supervised release issue, this is a very difficult case. It's a very unique [68] case. And I think my struggles are documented in the sentencing memo. It's difficult to be the judge sentencing one person out of a conspiracy when another judge has sentenced the other folks. And you can read what my considerations were and how I worked through it.

I think that it is appropriate with regard to the supervised release to take into consideration the amount of time that defendant has been under the supervision of the court while these legal proceedings have gone forward, and I'm going to impose a shortened supervised release in view of those facts, and I will be departing, I guess, from the three to five years that the guidelines call for.

Any questions about that, Mr. Lammers?

MR. LAMMERS: No, Your Honor.

THE COURT: Mr. Parrish?

MR. PARRISH: No, Your Honor.

THE COURT: Mr. Spies?

MR. SPIES: No, Your Honor.

THE COURT: I'm fighting a little bit – Mr. Huss can probably help me fashion the appropriate language on the recommendation for credit for completion of the RDAP program. And [69] we'll struggle maybe a little bit with the language, but we'll try to impart to BOP what our thoughts are on that. And I will write a letter to BOP and explain to them in this unique situation why I am requesting that they take a look at that.

All right. The Court then is ready to impose the judgment. It is the judgment of the Court that Jason Pepper is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 77 months on Count 1 of the indictment. I recommend that he be designated to a Bureau of Prisons's facility in close proximity to his family, commensurate with his security and custody classification needs. I also recommend to the Bureau of Prisons that he receive credit against his sentence for completion of the Residential Drug Abuse Treatment Program, consistent with the guidelines of the BOP for that program.

Upon release from imprisonment, Mr. Pepper, you will be on supervised release for a term of 12 months on Count 1 of the indictment. Within 72 hours of release from custody of the Bureau of

Prisons, you shall report in person to [70] the Probation Office in the district to which you are released. While you are on supervised release, you shall comply with the standard conditions of supervision. Those will be set forth in the judgment order.

In addition, you must not commit any federal, state, or local crimes. You shall not illegally possess a controlled substance. You shall not possess a firearm, ammunition, a destructive device, or any dangerous weapon. You shall cooperate in the collection of a DNA sample.

Please note that you are now a convicted felon. And even when you are off of court supervision, you cannot possess a firearm or ammunition for any reason. You can't hunt, you cannot have a weapon for self-protection, or – can't collect weapons, unless you petition and have your rights restored by the Bureau of Alcohol, Tobacco & Firearms.

While on supervised release, you must also comply with the following special conditions as ordered by the Court and implemented by Probation:

First, you must participate in and successfully complete a program of testing and [71] treatment for substance abuse. We will, of course, be looking at your situation when you come out of prison, and we'll be tailoring your substance abuse testing and treatment accordingly.

Second, you are not to use alcohol while you are under the supervision of the Court, and you cannot

enter bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

Third, you will be subject to the standard search conditions of this court. Any search will be based on reasonable suspicion and conducted in a reasonable manner, and the specifics of the condition will be set out in the judgment order.

I make the finding you do not have the ability to pay a fine and no fine is imposed. I order that you pay to the United States a special assessment of $100, which is due and payable immediately.

Mr. Huss, do we know if that's been paid?

PROBATION OFFICER: Your Honor, I'm not aware. It may be, and I'm not aware of it at this time.

[72] THE COURT: Okay. We'll check. I don't know if you remember even if it was paid.

THE DEFENDANT: I did pay that.

THE COURT: Okay. And we'll verify that and note that in the judgment order. Of course, Mr. Pepper can begin serving his sentence today, if he wishes, or the Court is willing to give him the privilege to self-report to the institution at which he'll be serving his sentence.

Mr. Pepper, if you want to self-report, then you have to make your way to the institution at which you're going to serve your sentence. That means you

have to make your own travel arrangements. You have to pay your own way. A third alternative would be you could surrender to the Marshal's Service here in Cedar Rapids in the next two or three weeks, or to a Marshal's Service near your home if you want to within the next two or three weeks, and then you wouldn't have to pay for travel.

What would you like to do?

THE DEFENDANT: I would like to just self-surrender to wherever I have to go.

THE COURT: Okay. So that means that following this sentencing proceeding, I'm going to [73] ask you to meet with a member of the Marshal's Service. They will tell you approximately when you will receive your designation and how you will receive it. It will then be your responsibility to make your way to that institution and report on time at the institution to serve your sentence. I know that you know that if you should fail to appear to serve your sentence, you can be charged with yet another federal criminal offense with separate penalties. So it's crucial that you show up, and I'm confident that you will. If there is any question relating to your surrender, please contact Mr. Spies or Mr. Parrish and let them contact the Marshal's Service and check things out. You don't want to take a chance that you're not where you're supposed to be.

So the Court finds that this defendant is not a risk of flight, nor a danger to the community, and I give him the privilege to self-surrender to an

institution designated by the Bureau of Prisons on the date and time as notified by the United States Marshal's Service. Until he reports, he will remain under the supervision of the court on the same terms and conditions that he's been on in the last few months.

* * *

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA	**AMENDED JUDGMENT IN A CRIMINAL CASE**
V.	(Filed Jan. 6, 2009)
JASON PEPPER	Case Number: CR03-4113-4-LRR USM Number: 02739-029
Date of Original Judgment: May 5, 2006 (Or Date of Last Amended Judgment)	Alfredo G. Parrish and Leon F. Spies Defendant's Attorney

Reason for Amendment:

- ■ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

■ pleaded guilty to count(s) 1 of the Indictment filed on 10/22/2003

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii) & 846	Conspiracy to Distribute 500 Grams or More of Methamphetamine Mixture	10/01/2003	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ is/are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 5, 2009
Date of Imposition of Judgment

/s/ Linda R. Reade
Signature of Judge

Linda R. Reade,
Chief U.S. District Court Judge
Name and Title of Judge

January 5, 2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: ***77 months on Count 1 of the Indictment**.

■ The court makes the following recommendations to the Bureau of Prisons:

*That the defendant be designated to a Bureau of Prisons facility as close to the defendant's family as possible, commensurate with the defendant's security and custody classification needs.

*That the defendant receive credit against his sentence for completing the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program in accordance with Bureau of Prisons policies and procedures.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

*■ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

*■ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: ***1 year on Count 1 of the Indictment**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

- ■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ■ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. Defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as defendant is released from the program by the probation officer.

2. Defendant is prohibited from the use of alcohol and is prohibited from frequenting bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

3. The defendant shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for

revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100* (paid)	$ 0	$ 0

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case* (AO 245C) will be after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$_____	$_____	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine ☐ restitution.

  ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B *☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA	**AMENDED JUDGMENT IN A CRIMINAL CASE**
V.	(Filed Jan. 6, 2009)
JASON PEPPER	Case Number: CR03-4113-4-LRR USM Number: 02739-029
Date of Original Judgment: January 5, 2009 (Or Date of Last Amended Judgment)	Alfredo G. Parrish and Leon F. Spies Defendant's Attorney

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

■ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

Asterisks (*) denote changes from Original Judgment

THE DEFENDANT:

■ pleaded guilty to count(s) 1 of the Indictment filed on 10/22/2003

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii) & 846	Conspiracy to Distribute 500 Grams or More of Methamphetamine Mixture	10/01/2003	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ is/are dismissed on the motion of the United States.

It is ordered that the defendant must **notify** the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 5, 2009
Date of Imposition of Judgment

/s/ Linda R. Reade
Signature of Judicial Officer

Linda R. Reade,
Chief U.S. District Court Judge
Name and Title of Judicial Officer

January 5, 2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: ***65 months on Count 1 of the Indictment**.

■ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a Bureau of Prisons facility as close to the defendant's family as possible, commensurate with the defendant's security and custody classification needs.

That the defendant receive credit against his sentence for completing the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program in accordance with Bureau of Prisons policies and procedures.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

■ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

■ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **1 year on Count 1 of the Indictment**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

- ■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ■ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. Defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as defendant is released from the program by the probation officer.

2. Defendant is prohibited from the use of alcohol and is prohibited from frequenting bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

3. The defendant shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for

revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100 (paid)	$ 0	$ 0

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

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If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$_____	$_____	

☐ Restitution amount ordered pursuant to plea agreement $_____

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☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

  ☐ the interest requirement is waived for the
    ☐ fine ☐ restitution.

  ☐ the interest requirement for the
    ☐ fine ☐ restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

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☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States of America, Appellee,
v. Jason Pepper, Appellant.

No. 09-1191

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

570 F.3d 958; 2009 U.S. App. LEXIS 14423

May 14, 2009, Submitted
July 2, 2009, Filed

COUNSEL: For United States of America, Plaintiff-Appellee: John H. Lammers, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Northern District of Iowa, Sioux City, IA.

Jason Pepper, Defendant-Appellant, Pro se, St. Joseph, IL.

For Jason Pepper, Defendant-Appellant: Alfredo G. Parrish, PARRISH & KRUIDENIER, Des Moines, IA; Leon Fred Spies, MELLON & SPIES, Iowa City, IA.

JUDGES: Before RILEY, SMITH, and COLLOTON, Circuit Judges.

OPINION BY: RILEY

OPINION

RILEY, Circuit Judge.

At issue in this appeal is whether the district court[1] exceeded the scope of our court's remand, committed procedural error, and abused its discretion in resentencing Jason Pepper (Pepper). This is the fourth time our court has considered Pepper's case. *See United States v. Pepper*, 518 F.3d 949 (8th Cir. 2008) (*Pepper III*), cert. denied, 129 S. Ct. 138, 172 L. Ed. 2d 105 (2008); *United States v. Pepper*, 486 F.3d 408 (8th Cir. 2007) (*Pepper II*), vacated, 128 S. Ct. 871, 169 L. Ed. 2d 715 (2008); *United States v. Pepper*, 412 F.3d 995 (8th Cir. 2005) (*Pepper I*). We have remanded the case for resentencing three times, and Pepper has been resentenced by two different district court judges after pleading guilty to conspiracy to distribute methamphetamine. Having carefully reviewed the record, we now affirm the sentence and judgment of the district court.

I. BACKGROUND

On October 22, 2003, Pepper was charged with conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Pepper pled guilty to the charge pursuant to

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[1] The Honorable Linda R. Reade, Chief Judge, United States District Court for the Northern District of Iowa.

a plea agreement. Based on Pepper's total offense level of 30 and criminal history category I, Pepper's advisory United States Sentencing Guidelines (Guidelines or U.S.S.G.) range was 97 to 121 months imprisonment. Although the charge to which Pepper pled guilty carried a mandatory minimum sentence of 120 months imprisonment, the mandatory minimum did not apply because Pepper was eligible for safety-valve relief pursuant to 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2.

The government filed a motion for a downward departure, pursuant to U.S.S.G. § 5K1.1, based on Pepper's substantial assistance, and recommended a 15% downward departure. The district court judge assigned to Pepper's case at the time sentenced Pepper to 24 months imprisonment, resulting in an approximately 75% downward departure from the low end of Pepper's advisory Guidelines range, and 5 years supervised release. The district court explained it arrived at the sentence of 24 months imprisonment because this was the minimum sentence Pepper could receive and still be eligible for the drug treatment program at the federal prison in Yankton, South Dakota.

The government appealed, and we reversed and remanded for resentencing, holding the district court erred by considering a matter unrelated to Pepper's assistance in granting the downward departure, "namely its desire to sentence Mr. Pepper to the shortest possible term of imprisonment that would allow him to participate in the intensive drug

treatment program at the federal prison in Yankton." *See Pepper I*, 412 F.3d at 999. We also reasoned, "given the pedestrian nature of Mr. Pepper's assistance, it is far from certain that the district court would have arrived at the same guidelines sentence had it considered only assistance-related elements." *Id.*

On remand, the district court again sentenced Pepper to 24 months imprisonment. The district court arrived at this sentence by first granting a 40% downward departure based on Pepper's substantial assistance, bringing the bottom of Pepper's advisory Guidelines range to 58 months. The district court then granted a downward variance from the 58 months to a sentence of 24 months imprisonment. The downward variance was based on Pepper's lack of a history of violence, the disparity in sentences between Pepper and his co-defendants, and Pepper's post-sentencing rehabilitation.

The government appealed this sentence, and we again reversed and remanded for resentencing. *See Pepper II*, 486 F.3d at 410, 413. We concluded that, while it was "a close call, we [could not] say the district court abused its discretion by the extent of the [U.S.S.G.] § 5K1.1 departure." *Id.* at 411. However, we held the district court abused its discretion in granting the downward variance because the district court considered improper factors, namely Pepper's post-sentencing rehabilitation, his lack of a history of violence, and the disparity in sentences among Pepper and his co-defendants "without

adequate foundation and explanation." *Id.* at 413. Based on statements the district court made during Pepper's resentencing hearing, expressing a reluctance to resentence Pepper should the case again be remanded, we remanded the case for reassignment and resentencing by a different district court judge. *Id.*

In the district court, Pepper's case was reassigned. On July 18, 2007, after giving the parties an opportunity to file briefs, the new district court judge issued an order on the scope of the remand (Remand Order), declaring, "The court will not consider itself bound to reduce [Pepper's] advisory Sentencing Guidelines range by 40% pursuant to U.S.S.G. § 5K1.1." The district court also informed the parties, in determining the appropriate downward departure pursuant to U.S.S.G. § 5K1.1, it would not consider any evidence of substantial assistance Pepper provided after Pepper's first resentencing.

In the meantime, Pepper petitioned the Supreme Court for writ of certiorari, and the Supreme Court granted the petition on January 7, 2008, vacating *Pepper II* and remanding the case to our court for further consideration in light of *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). *See Pepper v. United States*, 128 S. Ct. 871, 169 L. Ed. 2d 715 (2008) (mem.). In *Pepper III*, we "considered Gall's impact on Pepper's case," and we again reversed the sentence and remanded for resentencing

before a different district court judge. *Pepper III*, 518 F.3d at 950.

Pepper's case was again reassigned. The district court convened a resentencing hearing on October 17, 2008, at which time the parties presented witness testimony and other evidence, and counsel made arguments. The district court informed the parties, due to the extensive procedural history in Pepper's case, the district court intended to consider the arguments and evidence, issue a sentencing memorandum, and sentence Pepper at a later date.

On December 22, 2008, the district court issued a twenty-seven page sealed sentencing memorandum (Sentencing Memorandum). The district court noted the remand language of *Pepper III* was nearly identical to the language in *Pepper II*, and for the reasons stated in the earlier Remand Order, the district court again determined it was not "bound to reduce [Pepper's] advisory Sentencing Guidelines range by 40% for substantial assistance pursuant to [U.S.S.G. § 5K1.1]." The district court determined Pepper was entitled to a 20% downward departure for his substantial assistance. The district court next considered Pepper's request for a downward variance pursuant to 18 U.S.C. § 3553(a) based upon Pepper's characteristics and history, post-offense and post-sentencing rehabilitation, the disparity in sentences among Pepper and his co-defendants, and the cost of Pepper's incarceration. After considering the 18 U.S.C. § 3553(a) factors and Pepper's arguments, the district

court denied Pepper's motion for a downward variance.

On January 5, 2009, the district court reconvened Pepper's resentencing hearing to impose a sentence. Based on the district court's decision to grant a 20% downward departure pursuant to U.S.S.G. § 5K1.1, Pepper's advisory Guidelines range was 77 to 97 months. The district court sentenced Pepper to 77 months imprisonment and 12 months supervised release. Thereafter, the district court granted the government's January 2, 2009, Rule 35(b) motion to reduce Pepper's sentence further for the assistance Pepper provided after he was initially sentenced, reducing Pepper's sentence to 65 months imprisonment. Pepper's appeal followed.

II. DISCUSSION

A. Standard of Review

"We review all sentences, whether inside or outside the Guidelines range, under a deferential abuse of discretion standard." *Pepper III*, 518 F.3d at 951, cert. denied, 129 S. Ct. 138, 172 L. Ed. 2d 105 (2008) (citing *Gall*, 128 S. Ct. at 597). We "must first ensure that the district court committed no significant procedural error." *Gall*, 128 S. Ct. at 597. Examples of procedural error include: "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to

adequately explain the chosen sentence." *Id.* If we find "the district court's sentencing decision is procedurally sound, [we] then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.* "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id.*

B. Downward Departure

1. Scope of Our Remand for Resentencing

Pepper first argues "[t]he scope of the remand and law of the case from *Pepper II* and *Pepper III* required [the district court] to reduce Pepper's advisory [Guidelines] range by at least 40% pursuant to U.S.S.G. § 5K1.1." The government disagrees and contends the law of the case doctrine does not apply because our court did not place any limitation upon the district court's discretion in resentencing Pepper.

"On remand for resentencing, all issues decided by the appellate court become the law of the case, and the sentencing court is bound to proceed within the scope of any limitations imposed . . . by the appellate court." *United States v. Curtis*, 336 F.3d 666, 669 (8th Cir. 2003) (internal quotations and citations omitted). "Under the law of the case doctrine, a district court must follow our mandate, and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms." *Jaramillo v.*

Burkhart, 59 F.3d 78, 80 (8th Cir. 1995) (citation omitted). "Ultimately, the scope of a remand must be determined by reference to the analysis contained in the opinion." *United States v. Kendall*, 475 F.3d 961, 964 (8th Cir. 2007) (citing *United States v. Santonelli*, 128 F.3d 1233, 1237 (8th Cir. 1997)). When we decide to remand a case for resentencing, we have two options: (1) we may remand the case with instructions limiting the scope of the district court's discretion, or (2) we may remand without placing any limitations on the district court's discretion. *See id.* at 964.

We used the following remand language in the conclusion of *Pepper III*: "For the foregoing reasons, we again reverse and remand Pepper's case for resentencing consistent with this opinion. As the district court expressed a reluctance to resentence Pepper again should the case be remanded, we again remand this case for resentencing by a different judge." *Pepper III*, 518 F.3d at 953. *Pepper III*'s remand language is nearly identical to the remand language in *Pepper II*. *See Pepper II*, 486 F.3d at 413 ("For the reasons stated, we reverse and remand this case for resentencing consistent with this opinion. The district court expressed a reluctance to resentence Pepper again should this case be remanded. Thus, we remand Pepper's case for re-sentencing by a different judge.").

In the district court's Remand Order, which was reaffirmed by the district court in the Sentencing Order, the district court explained, "The only specific restrictions on the court's decision on remand were

(1) the second resentencing hearing should take place before a different judge and (2) such judge's decision should be 'consistent with [*Pepper II*].'" The district court observed that while our court "indicated that a 40% downward departure was not an abuse of discretion[,]" we did not "hold that a 40% downward departure [wa]s the only reasonable outcome for [Pepper] or that the [district] court must impose a 40% downward departure on remand pursuant to USSG §5K1.1."

We agree with the reasoning of the district court. Our remand was a general remand for resentencing. Our opinions in *Pepper II* and *Pepper III* did not place any limitations on the discretion of the newly assigned district court judge in resentencing Pepper. We did not specify the district court's discretion would be restricted to considering whether a downward variance was warranted, nor did we specify the district court would be bound by the 40% downward departure previously granted. We concluded a 40% downward departure was not an abuse of discretion. In other words, a 40% downward departure was within the range of reasonableness.[2] Under the circumstances of Pepper's case, a complete resentencing

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[2] The language we used in *Pepper II* suggested a 40% departure was at the outer boundary of the range of reasonableness. *See Pepper II*, 486 F.3d at 411 (declaring it was "a close call" whether the district court "abused its discretion by the extent of the § 5K1.1 departure"). In our original decision, we referred to "the pedestrian nature of Mr. Pepper's assistance." *Pepper I*, 412 F.3d at 999.

without any restrictions on the district court's discretion was preferable, in contrast to a partial, piecemeal resentencing limiting the sentencing judge's discretion. We conclude neither the scope of our remand, nor the law of the case doctrine, required the district court to grant Pepper a 40% downward departure for substantial assistance.

2. Extent of the Downward Departure

We turn to Pepper's next argument that the district court abused its discretion by refusing to depart downward by more than 20% based on Pepper's substantial assistance. We dispose of this argument easily. "[T]he extent of a downward departure in the defendant's favor lies within the district court's discretion and is virtually unreviewable on a defendant's appeal, absent an unconstitutional motive animating the district court." *United States v. Dalton*, 478 F.3d 879, 881 (8th Cir. 2007). As Pepper has not asserted an unconstitutional motive played a role in the district court's decision, we lack jurisdiction to review the extent of the departure. *See United States v. McFarlane*, 309 F.3d 510, 512 (8th Cir. 2002) (citing *United States v. DeBuse*, 289 F.3d 1072, 1075 (8th Cir. 2002) (noting, we "lack [ ] jurisdiction to review the extent of the district court's downward departure" unless the defendant asserts a violation of constitutional or federal statutory law). We affirm the district court's judgment with respect to the extent of the downward departure.

C. Downward Variance

Pepper next challenges the district court's denial of his motion for a downward variance. Pepper argues the district court abused its discretion in refusing to consider Pepper's post-sentencing rehabilitation and the cost of his incarceration as bases for varying downward under 18 U.S.C. § 3553(a).[3]

---

[3] Under 18 U.S.C. § 3553(a), a district court is to consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range . . . ;
>
> (5) any pertinent policy statement . . . [;]
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

1. Post-Sentencing Rehabilitation

While Pepper acknowledges our court explicitly has stated that post-sentencing rehabilitation is not a permissible factor to consider in granting a downward variance, and that the district court was merely following our precedent in refusing to consider this factor, Pepper nevertheless suggests, under the unique circumstances of his case, post-sentencing rehabilitation is an appropriate consideration. Pepper urges us to consider the fact Pepper's rehabilitation began before Pepper "realized his 24 month sentence of imprisonment and five years of supervised release would turn into a 65 month term of imprisonment and one year of supervised release."

We agree Pepper made significant progress during and following his initial period of imprisonment. While in prison, Pepper completed a 500-hour drug treatment program. Three days after we issued our opinion in *Pepper I*, Pepper completed his term of imprisonment on June 27, 2005, and began serving his term of supervised release. Pepper enrolled at Western Iowa Tech Community College. In 2007, Pepper married and became a stepfather to his wife's daughter. At the time of his second resentencing in October 2008, Pepper was working as a supervisor of the night crew at Sam's Club and attending school in Illinois.

We commend Pepper on the positive changes he has made in his life. However, the law of our circuit is clear. "[E]vidence of [a defendant]'s post-sentence

rehabilitation is not relevant and will not be permitted at resentencing because the district court could not have considered that evidence at the time of the original sentencing." *Pepper III*, 518 F.3d at 953 (internal quotation marks omitted) (quoting *Pepper II*, 486 F.3d at 413 (in turn quoting *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007))). *See also United States v. McMannus*, 496 F.3d 846, 852 n.4 (8th Cir. 2007) ("While it is difficult not to be swayed by [defendant's] post-sentencing rehabilitation successes, allowing this evidence to influence his sentence would be grossly unfair to the vast majority of defendants who receive no sentencing-court review of any positive post-sentencing rehabilitative efforts."). "'This panel is bound by Eighth Circuit precedent, and cannot overrule an earlier decision by another panel.'" *United States v. Lovelace*, 565 F.3d 1080, 1085 (8th Cir. 2009) (quoting *Passmore v. Astrue*, 533 F.3d 658, 660 (8th Cir. 2008)).

2. Cost of Incarceration

Finally, Pepper contends the district court abused its discretion in refusing to consider the cost of incarceration as a basis for varying downward. In the Sentencing Memorandum, the district court cited as support for its decision our prior opinions in *United States v. Collins*, No. 98-3765, 1999 U.S. App. LEXIS 32013, 1999 WL 1143677, at *1 (8th Cir. Dec. 2, 1999) (unpublished) (determining, "the economic costs of incarcerating [the defendant] is not a factor which the Court should have considered as a basis for

departure"), and *United States v. Wong*, 127 F.3d 725, 728 (8th Cir. 1997) (explaining, "[t]he decision whether tax dollars should be used to pay for lengthy sentences is a congressional determination, not one to be made by federal courts[,]" and "[t]he Sentencing Guidelines do not mention the expenses of imprisonment as a factor a court may use in deciding whether to depart from the Guidelines"). The district court then opined, even if the cost of incarceration were an appropriate consideration under Eighth Circuit precedent, the district court did "not believe the cost of incarceration fits with any of the factors listed for imposing sentence under 18 U.S.C. § 3553(a)."

We agree with the reasoning of the district court, and this view was shared by another panel of our court in a recent opinion. *See United States v. Molina*, 563 F.3d 676, 678 (8th Cir. 2009) (citations omitted) ("Although sentencing courts are required to consider the sentencing factors set out in 18 U.S.C. § 3553(a), the cost of imprisonment is not among them. Thus, we doubt that sentencing courts have the authority to impose lesser sentences based on the cost of imprisonment."). *See also United States v. Tapia-Romero*, 523 F.3d 1125, 1127 (9th Cir. 2008) (concluding, "§ 3553(a) neither requires, nor allows, a court to consider the cost of imprisonment in determining the appropriate length of a defendant's term of imprisonment"). The district court did not abuse its discretion in refusing to consider the cost of Pepper's incarceration as a basis for varying downward.

Further, "giv[ing] due deference to the district court's decision that the § 3553(a) factors, on a whole, justify" Pepper's sentence, *Gall*, 128 S. Ct. at 597, our review of Pepper's sentence reveals no abuse of the district court's considerable discretion and no basis for concluding Pepper's sentence is substantively unreasonable.

III. CONCLUSION

We affirm Pepper's sentence and the judgment of the district court.

(ORDER LIST: 561 U.S.)

MONDAY, JUNE 28, 2010

* * *

CERTIORARI GRANTED

* * *

09-6822 PEPPER, JASON V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

PETITIONER'S BRIEF

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No. 09-6822

In The Supreme Court of the United States

JASON PEPPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED

1. Whether a court of appeals may categorically prohibit sentencing courts from considering defendants' post-sentencing rehabilitation in determining appropriate sentences.

2. Whether, when a new judge is assigned to resentence a defendant after remand, the new judge is obligated under the law of the case doctrine to follow the original judge's sentencing findings left undisturbed on appeal.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reprinted in the Joint Appendix at J.A. 364 and is published as *United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009). The opinions of the United States District Court for the Northern District of Iowa are reprinted at J.A. 201 and in the Sealed Joint Appendix at S.J.A. 24.

JURISDICTION

The district court had jurisdiction over this case pursuant to 18 U.S.C. §3231. The United States Court of Appeals for the Eighth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742. The court of appeals issued its opinion on July 2, 2009. J.A. 364. On September 29, 2009, Pepper filed his petition for a writ of certiorari, which the Court granted on June 28, 2010. J.A. 380. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions, 18 U.S.C. §§3553(a) and (c), 18 U.S.C. §3661, and 21 U.S.C. §850, are reprinted in an appendix to this brief.

STATEMENT OF THE CASE

Jason Pepper pled guilty to a federal drug conspiracy charge for which he was sentenced in 2004 and again in 2006 to a term of 24 months of imprisonment. After receiving drug treatment in prison and completing his term of imprisonment, Pepper attended college full time, achieved top grades, held a steady job, was promoted, married, and supported a family. The government appealed each sentence. The Eighth Circuit reversed each sentence on a different ground, and found it "just" to assign the case to a new judge. Notwithstanding the undisputed evidence that Pepper was rehabilitated and living a productive life, the new judge increased Pepper's term of imprisonment from 24 to 65 months, and – nearly four years after completing the original term – Pepper returned to the Bureau of Prisons to serve an additional 41 months.

This case presents two issues: whether a court of appeals may prohibit a sentencing judge from considering evidence of post-sentencing rehabilitation in support of a variance under 18 U.S.C. §3553(a) at resentencing; and, whether a judge who has been substituted by the court of appeals for the original judge may reduce the extent of the original judge's substantial assistance departure finding left undisturbed by the court of appeals.

A. Original Sentence and First Government Appeal

In 2003, at age 24, Jason Pepper had been addicted to methamphetamine and alcohol for six years. J.A. 24-25; S.J.A. 16. Pepper had done well in high school, earning a 3.4 grade point average. S.J.A. 17. After graduating from high school, in 1998, Pepper lost his brother in a car accident, after which he attempted suicide. S.J.A. 16. In 2002, he lost his mother to colon cancer, after which he was virtually homeless. J.A. 36; S.J.A. 15. His relationship with his father was strained. S.J.A. 15. He received no treatment for his addictions. S.J.A. 16.

In October 2003, still suffering from untreated depression resulting from the deaths of his brother and mother, Pepper was charged with conspiring to distribute methamphetamine in violation of 21 U.S.C. §846. J.A. 21, 25-26. Immediately upon arrest, Pepper admitted his guilt, cooperated, and provided useful assistance to law enforcement. S.J.A. 9-11. He pled guilty to the offense, which carried a mandatory minimum term of ten years' imprisonment. The mandatory minimum subsequently became inapplicable because Pepper qualified for "safety-valve" relief from the minimum, due to his lack of any prior criminal record, and lack of violence or aggravating role in the offense. 18 U.S.C. §3553(f); USSG §5C1.2.

The probation officer, consistent with the parties' plea agreement, found that Pepper's base offense level under the U.S. Sentencing Guidelines was 34

based on the quantity of methamphetamine. S.J.A. 3-4, 8, 13. The officer added one level for occurrence of the offense near a protected location (some transactions took place at an acquaintance's apartment located near a park), subtracted two levels for safety-valve eligibility, and subtracted three levels for acceptance of responsibility, resulting in an adjusted offense level of 30. S.J.A. 10, 13-14. Pepper had no convictions, placing him in Criminal History Category I. S.J.A. 18. With a total offense level of 30 and criminal history category of I, the guideline range was 97 to 121 months. The probation officer noted that, absent the parties' stipulations under the plea agreement, he might have rejected the one-level enhancement for a protected location and applied a two-level decrease for minor role. S.J.A. 18. Those changes would have resulted in an adjusted offense level of 27 and a range of 70 to 87 months of imprisonment. The probation officer noted that Pepper's father reported seeing significant improvement in his son's attitude and maturity since his arrest. S.J.A. 15.

Pepper appeared for sentencing before then-Chief Judge Mark Bennett in March of 2004. After agreement by the parties that Pepper's guideline range was 97 to 121 months, the government moved for a substantial assistance departure, recommending a 15% reduction based on the following: (1) upon arrest, Pepper timely provided a post-*Miranda* statement without counsel; (2) he provided a proffer statement with his counsel present; (3) the government was able to use his information before the grand jury; (4) he

was a corroborating witness against one defendant who was his source, and was a main witness against a second defendant, both of whom were indicted; (5) he was a witness on a firearms count; and (6) he was truthful and reliable. J.A. 28, 30-35. Defense counsel added that Pepper had provided information regarding ten or eleven people involved in trafficking drugs. J.A. 37-38.

Defense counsel reviewed Pepper's background, covering his strong academic record, the misfortune of losing close family members, his homelessness, his drug addiction and his desire for treatment, and his relief that his arrest got him away from methamphetamine. J.A. 36-38. Counsel additionally noted that Pepper's father was in the courtroom to support his son.[1] Based on these factors, and consistent with the probation officer's recommendation, counsel requested a downward departure so that Pepper could be placed in the federal boot camp at Lewisburg, Pennsylvania. J.A. 38.

Although willing to make that recommendation, Judge Bennett expressed concern that Pepper would not receive the comprehensive drug treatment he needed at boot camp. J.A. 38-39. The judge had previously recommended placement of other defendants

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[1] The judge noted that Pepper's father had written a "very thoughtful letter," and of the thousands of letters the judge had received over the years, it was clearly one of the most thoughtful. J.A. 36.

at the federal prison camp in Yankton, South Dakota, where he spoke bi-monthly with inmates in the facility's 500-hour intensive drug treatment program. J.A. 39. Observing that Yankton's treatment program was the best, the judge noted that there was a trade-off, in that Pepper would serve more time at Yankton than he would at Lewisburg. J.A. 40. Pepper asked that he be sent to Yankton so that he could obtain the drug treatment he desired. The government made no objection and stood by its initial recommendation. J.A. 41. After telephoning Yankton, the judge determined, in light of the facility's waiting list, that he would have to impose a sentence of at least 24 months to ensure that Pepper would receive treatment. J.A. 42-43.

Based on the government's substantial assistance motion and the factors listed in USSG §5K1.1, the judge committed Pepper to the Bureau of Prisons for 24 months, recommending designation to Yankton with placement in the 500-hour residential drug treatment program. J.A. 45, 52. The court also imposed a five-year term of supervised release. J.A. 45, 53. The judge explained his reasons for the sentence, noting Pepper's strong family support, his great promise and potential, and the court's expectation that Pepper would succeed on supervised release. J.A. 47-49.

The government appealed the sentence to the Eighth Circuit, which ruled that the district court erred when it considered a matter unrelated to Pepper's substantial assistance under USSG §5K1.1.

United States v. Pepper, 412 F.3d 995, 996-99 (8th Cir. 2005) (*Pepper I*); J.A. 64-69. The Eighth Circuit remanded for resentencing in accordance with its opinion and *United States v. Booker*, 543 U.S. 220 (2005). J.A. 70. Three days after the decision issued, Pepper was released and began his five-year term of supervised release. J.A. 102.

B. First Resentencing and Second Government Appeal

In May of 2006, having been on supervised release for over ten months, Pepper appeared before Judge Bennett for resentencing. J.A. 102-03. The probation officer had updated the presentence investigation report, recommending that in light of the "unique" post-release mitigating factors in the case, a downward variance from the guideline range to the original 24-month sentence would be "reasonable in conjunction with the substantial assistance reduction." S.J.A. 23. The officer carefully analyzed the factors required to be considered under 18 U.S.C. §3553(a). S.J.A. 20-23. The officer found, in relation to §3553(a)(1) (history and characteristics of defendant), Pepper had no history of violence; he had a significant long-term alcohol and drug abuse problem for which he had received no treatment; he had been drug-free since his arrest in October of 2003; he had attempted suicide after his brother's death in 1998; he had taken care of his dying mother and was left homeless after her death; he had had a distant relationship with his father; and he had complied with all

conditions of supervised release, maintained employment, was a model full-time college student, and had reunited with his father. S.J.A. 20, 23. The officer further found, based on §3553(a)(2) (need for sentence imposed to satisfy sentencing purposes), Pepper had a minimal criminal history and a low probability of committing future crimes. S.J.A. 20. Finally, with regard to §3553(a)(6) (need to avoid disparities among similar defendants), the officer noted that one of Pepper's co-defendants received a 26% reduction, another received a 70% reduction that the government did not appeal, and a third received a 50% reduction as to which the government withdrew its appeal. S.J.A. 21.

Pepper, through counsel, requested a variance from the guideline range based on post-sentencing rehabilitation. J.A. 71, 73. Counsel also filed a transcript of Pepper's grades from the community college he attended (all As) and a congratulatory letter from the dean of students. J.A. 93-95. The government opposed a variance based on post-sentencing rehabilitation, relying on Eighth Circuit precedent prohibiting "departure" on that basis. J.A. 86-90.

At the hearing, Judge Bennett first heard statements from the parties regarding the departure for substantial assistance, then evidence concerning the request for variance. Tr. Resentencing 1-15 (May 5, 2006, Dist. Docket 134). Pepper testified that he had gotten his life back on track after his arrest and drug treatment, and that he would never return to using or selling drugs. J.A. 104-05, 111-12. While at Yankton,

he completed the drug treatment program, but was released before he could receive a reduction in sentence as provided by 18 U.S.C. §3621(e). J.A. 105-06. After release, Pepper found employment, worked part-time while attending college full-time, and complied with all conditions of supervised release. J.A. 106-11.

Pepper's father also testified. He described his previously strained relationship with his son, and said that they had reestablished a communicative, closer relationship. J.A. 116-19. He testified that Pepper no longer used drugs or alcohol, had matured, and was planning for the future. J.A. 119-20. He believed that his son's successful completion of the drug treatment program at Yankton truly sobered him and changed his thinking. J.A. 120-21.

The probation officer testified, echoing his memorandum. The officer told Judge Bennett that, based on his experience and his discussions with Pepper's supervising probation officer, Pepper had learned his lesson, already demonstrated that he would do well on supervision, and was at low risk of re-offending. J.A. 122, 124-31, 133-34.

Judge Bennett made his findings, pursuant to 18 U.S.C. §3553(c), regarding the substantial-assistance departure and post-sentencing rehabilitation. Regarding the former, Judge Bennett, noting the Eighth Circuit's description of Pepper's assistance as "pedestrian," *see Pepper I*, 412 F.3d at 999; J.A. 69, and interpreting "pedestrian" to mean average, departed

to 58 months. J.A. 138-43.[2] The judge explained that he relied on Eighth Circuit precedent, on his discussions with other federal district court judges around the country, and on the facts that Pepper had been timely with his cooperation, was entirely truthful and candid, had been debriefed, gave a proffer, and provided grand jury testimony. J.A. 141-43.

The judge then addressed the variance request, adopting as his findings of fact the information contained in the probation officer's memorandum and Pepper's and his father's testimony. J.A. 143-45. The judge considered whether those findings warranted a variance from the 58-month sentence. Deciding that they did, the judge reduced the sentence to 24 months. J.A. 143, 146. Judge Bennett, who had sentenced about 1,400 defendants in approximately ten years on the federal bench, J.A. 47, 149, found that Pepper's case was "exceptional," that he had no history of violence, had been attending school and earning all As, and that there would be disparity between Pepper and his co-defendants if Pepper did not receive a variance. J.A. 144-47, 149. The judge found that Pepper had an "extremely low risk of recidivism" as compared to the many other defendants he had sentenced.[3] J.A. 146. The

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[2] The judge noted recent data from the Sentencing Commission showing that the average departure nationwide in federal drug cases was 46.5%. J.A. 139.

[3] Earlier, during the hearing, the judge referred to Pepper's current schooling and employment, noting that very few defendants followed this path. J.A. 136.

court deemed it appropriate to consider Pepper's exemplary conduct following his release from prison. He explained that post-sentencing conduct is relevant, noting that if Pepper had committed new crimes following his release, that would be an important factor to consider during resentencing, and the government would advocate such consideration. J.A. 146-47. The judge explained at length why the final sentence of 24 months (and specifically, the 34-month variance) was warranted in Pepper's "exceptional" case. J.A. 143-50.

The government again appealed Pepper's sentence and, in May 2007, the Eighth Circuit reversed Judge Bennett's downward variance. *United States v. Pepper*, 486 F.3d 408 (8th Cir. 2007) (*Pepper II*); J.A. 164. It first determined that "reasonable proportionality" existed between Pepper's cooperation and Judge Bennett's 40% substantial assistance departure. *Id.* at 411; J.A. 167. The appellate court found that Judge Bennett properly identified only assistance-related factors, that he considered the §5K1.1 factors, including the government's recommendation, that he considered Eighth Circuit precedent, and that a 40% reduction was warranted. *Id.*; J.A. 167-68. Based on this ruling, Pepper's sentence was 58 months.

The court of appeals, however, found error in the variance from 58 months to 24 months. It stated that "[t]he lack of clarity regarding the extent to which

the district court relied on any one factor notwithstanding, we conclude the district court abused its discretion in granting the downward variance." *Id.* at 413; J.A. 172. Specifically, the court of appeals noted:

> The district court failed to balance the other factors in §3553(a), such as the need to impose a sentence reflecting the seriousness of Pepper's offense, which involved between 1,500 and 5,000 grams of methamphetamine mixture and ten to fifteen people, or how, in this case, a sentence of 24 months would promote respect for the law. The district court impermissibly considered Pepper's post-sentence rehabilitation, and further erred by considering Pepper's lack of violent history, which history had already been accounted for in the sentencing Guidelines calculation, and by considering sentencing disparity among Pepper's co-defendants without adequate foundation and explanation.

Id.; J.A. 172. The court reversed and remanded for resentencing consistent with its opinion, and, because Judge Bennett "expressed a reluctance to resentence Pepper again should this case be remanded," required resentencing by a different judge, to be assigned by the chief judge of the district.[4] *Id.*; J.A. 173.

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[4] Judge Bennett had noted during the hearing that the court of appeals might once again reverse his sentencing determination, and while he acknowledged that he "w[ouldn't] like it"

(Continued on following page)

On the day the Eighth Circuit's decision issued, Chief District Judge Linda Reade reassigned the case to herself for resentencing. J.A. 4 (docket 147). Judge Reade first ordered the parties to address the legal issue of the scope of the remand from *Pepper II*. J.A. 174. Regarding the departure for substantial assistance, the government initially argued that while Pepper had provided additional assistance since the previous sentencing by Judge Bennett, it did "not believe that the additional assistance merits a departure beyond the 40% reduction awarded at the last sentencing hearing." J.A. 178. Five days later, the government argued that "the Court of Appeals placed no explicit limitations on the district court with regard to the substantial assistance departure, other than to preclude an argument that a 40% departure is unreasonable." J.A. 196. The government also argued that there could be no variance for lack of violent history, disparity between co-defendants, or post-sentencing rehabilitation. J.A. 199. Defense counsel argued that Judge Reade was bound to follow Judge Bennett's 40% departure to 58 months imprisonment and again argued for a variance based on post-sentencing rehabilitation. J.A. 191-93.

Judge Reade ruled that she would "not consider" herself "bound to reduce the Defendant's advisory

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if the appellate court compelled him to impose a higher sentence, he repeatedly stated that he would sentence Pepper in accordance with any subsequent instructions from the court of appeals. J.A. 147-50.

Sentencing Guidelines range by 40%, pursuant to USSG §5K1.1." J.A. 209. She continued the resentencing hearing pending the disposition of Pepper's petition for a writ of certiorari seeking review of the *Pepper II* decision. J.A. 7 (docket 171).

This Court vacated the Eighth Circuit's judgment and remanded for reconsideration in light of *Gall v. United States*, 552 U.S. 38 (2007). J.A. 210. The Eighth Circuit issued its third opinion in March of 2008. *United States v. Pepper*, 518 F.3d 949 (8th Cir. 2008) (*Pepper III*); J.A. 211. It again reversed Judge Bennett's judgment and remanded for resentencing by a different judge. *Id.* at 950, 953; J.A. 212, 219. The court of appeals began by reaffirming its previous finding that Judge Bennett had not abused his discretion regarding the §5K1.1 departure. *Id.* at 951; J.A. 213-14. The court, however, found that Judge Bennett had committed procedural error by not sufficiently explaining his reliance on Pepper's lack of violence and on the comparison of Pepper's case to that of his co-defendants. *Id.* at 952; J.A. 215-17. Further, the Eighth Circuit found that "*Gall* does not alter our circuit precedent or our conclusion in *Pepper II* that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance," and that the judge had "procedurally erred" by relying on this "improper" factor. *Id.* at 952-53; J.A. 218. Pepper sought certiorari review of *Pepper III*, which was denied. J.A. 9, 10 (docket 183, docket 191).

C. Resentencing Before Judge Reade and Pepper's Appeal

On October 17, 2008, Judge Reade began Pepper's second resentencing. J.A. 10 (docket 195). By then, Pepper had been out of prison for nearly three and a half years, exhibiting exemplary behavior throughout that time on supervision. Prior to the hearing, the government urged Judge Reade to ignore Judge Bennett's findings regarding Pepper's cooperation and impose a smaller departure based on the same facts, and to ignore Pepper's post-sentencing rehabilitation. J.A. 268. Pepper urged Judge Reade to follow the law of the case and impose the same substantial assistance departure, and to impose a downward variance for post-sentencing rehabilitation. J.A. 220, 265.

Judge Reade began by explaining that because the case was very difficult, she would delay the imposition of the sentence until a later date, after she had considered the evidence and arguments and issued a written sentencing opinion. J.A. 280. The government offered no evidence. J.A. 282-85. To inform the court of Pepper's up-to-date history, defense counsel called Pepper's father and Pepper made a statement. Pepper was then 29 years old and had married in May of 2007. J.A. 302, 305, 321. His wife had a seven-year-old daughter who considered Pepper her father. J.A. 302, 321. Pepper had been employed by Sam's Club for the past two years, working as a night supervisor. According to the store manager and overnight assistant manager, Pepper was an

exemplary employee. He had been named associate of the year, and was being considered for promotion to manager in January 2009. J.A. 301-02, 320, 323-26. While working, he attended college full-time to study business management. J.A. 301-04, 320, 327-28. Defense counsel requested a variance to the original 24-month sentence. J.A. 316-18.

Judge Reade filed a sealed sentencing memorandum two months later. S.J.A. 24. Based on the same facts that Judge Bennett had relied on to award a 40% reduction for substantial assistance, Judge Reade awarded Pepper only a 20% reduction. S.J.A. 31-33, 49. She denied every other request for downward variance, including the one for post-sentencing rehabilitation. S.J.A. 33-49.

On January 5, 2009, nearly five years after Pepper's original sentencing, Judge Reade imposed a new sentence. Based on Pepper's cooperation with the government, she departed to 77 months of imprisonment, instead of Judge Bennett's departure on the same facts to 58 months. J.A. 333-34. She then departed another 15% based on the government's motion pursuant to Fed. R. Crim. P. 35(b), acknowledging Pepper's additional cooperation following the prior sentencing, for a final sentence of 65 months. S.J.A. 59-60. Finding that Pepper was not a threat to the community or a flight risk, she permitted him to self-surrender, which he did in early April 2009. J.A. 337-39.

On Pepper's appeal, the Eighth Circuit – in its fourth opinion in this case – affirmed Judge Reade's sentence. *United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009) (*Pepper IV*); J.A. 364. The court of appeals determined that Judge Bennett's findings regarding Pepper's cooperation did not constitute the law of the case and that Judge Reade did not abuse her discretion in departing downward by only 20% for substantial assistance. *Id.* at 963-64; J.A. 371-74. Additionally, the court of appeals commended Pepper for his positive life changes, but affirmed Judge Reade's denial of a variance on that basis because evidence of post-sentencing rehabilitation is an impermissible consideration for downward variance under Eighth Circuit precedent. *Id.* at 964-65; J.A. 375-77.

In light of this Court's grant of certiorari in *Pepper IV*, Judge Reade ordered Pepper's release from prison in late July of 2010. J.A. 13-14 (docket 232, docket 237).

SUMMARY OF THE ARGUMENT

I. A defendant's post-sentencing rehabilitation is undoubtedly, as the government agrees, a permissible ground for varying from a guideline range. *See* Brief in Opp. to Cert. at 8, 10-11, 13-16. The contrary ruling of the Eighth Circuit is incorrect because it conflicts with the governing statutes, 18 U.S.C. §§3661 and 3553(a); because it is inconsistent with

the abuse-of-discretion standard of appellate review established in *United States v. Booker*, 543 U.S. 220 (2005), and *Gall v. United States*, 552 U.S. 38 (2007); and because the Eighth Circuit's justifications for the creation of a blanket rule forbidding consideration of this factor are without merit.

The Eighth Circuit categorically forbids district judges to consider evidence of a defendant's post-sentencing rehabilitation as a basis for varying below the guideline range. There is no statutory authority for this ad hoc rule. Indeed, the rule violates the statutes that now govern sentencing in the federal courts, 18 U.S.C. §§3661 and 3553(a). Section 3661 explicitly provides that "*[n]o limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The Eighth Circuit's rule is thus an unlawful "limitation" on a district court's power to consider the background, character and conduct of a defendant at sentencing.

The Circuit's rule is also inconsistent with 18 U.S.C. §3553(a), which mandates that a district court "shall consider," among other factors, "the *history and characteristics* of the defendant." *Id.* (emphasis supplied). The statute includes no exception to this requirement, and the Eighth Circuit's rule is directly contrary to its mandate.

In addition, the Circuit's adoption of its categorical rule is inconsistent with the standard of review for "reasonableness" or "abuse-of-discretion," applicable on appeal. This deferential standard, made applicable in *Booker*, 543 U.S. at 260-62, was explained in *Gall* to result from the fact that the "sentencing judge," not the appellate court, "is in a superior position to find facts and judge their import under §3553(a)." *Gall*, 552 U.S. at 51-52. For an appellate court to determine categorically which facts about defendants may be considered, and which may not, is thus the antithesis of "abuse-of-discretion" review. *See id.*

The Eighth Circuit's justifications for its rule – that information about post-sentencing rehabilitation is irrelevant, that considering it creates improper disparities at sentencing, and that it interferes with the functions of the Bureau of Prisons – are simply incorrect. First, factors such as Pepper's having overcome a long addiction, having established, and reestablished, close family ties, having succeeded both at work and in his education, and having avoided all criminal activity, are self-evidently relevant to the statutory aims of providing adequate specific deterrence, protecting the public, effectively achieving rehabilitation, and assuring respect for the law. 18 U.S.C. §3553(a)(2); *see Gall*, 552 U.S. at 54 (excessive punishment may decrease respect for the law). Second, the Eighth Circuit's concern with "disparity," because few defendants have the opportunity to show post-sentencing rehabilitation, reflects nothing more than the truism that the course of litigation may

affect outcomes. A rule prohibiting consideration of evidence based on such "disparity" would prove too much, for it would, if consistently applied, invalidate sentences based on all manner of commonplace disparities – for example, between those released on bail, who can most easily show pre-sentencing rehabilitation, and those who are not released, or between those who have full knowledge about the extent of their crimes, and thus can reduce their sentences by cooperation with the government, and those who do not have that knowledge and cannot obtain a reduction. Indeed, the Eighth Circuit does not apply its rule consistently, for it has approved consideration of post-sentence conduct when it supports a higher sentence on remand. Finally, the concern that permitting consideration of post-sentencing rehabilitation would somehow interfere with the prerogatives of the Bureau of Prisons is wholly without merit, since such consideration in imposing sentence is entirely separate from the functions of the Bureau.

There is, in short, no legal authority or policy justification for the Eighth Circuit's rule against consideration of post-sentencing rehabilitation. Therefore, the Eighth Circuit's judgment precluding the consideration of post-sentencing rehabilitation should be vacated.

II. The Eighth Circuit also erred by concluding that Chief Judge Reade was not bound by the law of the case in the circumstances here. Following the Eighth Circuit's initial remand in this case, Judge Bennett reconsidered the value of Pepper's assistance to the government and found that it alone warranted

a reduced sentence of 58 months' imprisonment, characterized as a 40% departure. This finding was undisturbed on the government's second appeal. On remand on other grounds, Chief Judge Reade, newly assigned to the case after Judge Bennett's removal, revisited the question and, with no new evidence, concluded that Pepper's substantial assistance warranted a departure only to 77 months of imprisonment, rather than the 58-month term Judge Bennett had found sufficient.

In these circumstances, the sentence imposed by Chief Judge Reade violated the law of the case doctrine. That doctrine provides that, as a general rule, a district judge should not alter another district judge's previous rulings in the case absent special circumstances and a compelling justification. Here, the record shows no new circumstances or any compelling reason for this change, but only Chief Judge Reade's different view of the same evidence upon which Judge Bennett relied. Such a change in sentencing by a judge newly assigned following appeal is of particular concern because it strongly implicates the purposes of the law of the case doctrine in achieving finality and consistency in litigation and, particularly in these circumstances, in assuring that there be no appearance of arbitrariness or injustice in sentencing, due merely to a change in judicial personnel assigned to a case.

This Court should accordingly vacate the judgment below, which was based on the Eighth Circuit's misunderstanding of the law of the case doctrine.

ARGUMENT

I. THE EIGHTH CIRCUIT'S BLANKET PROHIBITION AGAINST CONSIDERATION OF EVIDENCE OF POST-SENTENCING REHABILITATION AS A BASIS FOR VARIANCE IS CONTRARY TO THE APPLICABLE SENTENCING STATUTES AND THE ABUSE-OF-DISCRETION STANDARD OF REVIEW.

The Eighth Circuit forbids judges, categorically and as a matter of circuit law, from considering post-sentencing rehabilitation as a basis for varying below the guideline range. The Eighth Circuit applies this rule in the guise of abuse-of-discretion review, but the rule functions in the same way that the Sentencing Commission's restrictions on "departures" did when the Guidelines were mandatory: it prohibits judges from considering matters otherwise properly considered under 18 U.S.C. §§3661 and 3553(a) for purposes of varying outside the guideline range.

The Eighth Circuit first declared that evidence of post-sentencing rehabilitation was "not relevant" for purposes of "downward departure" in *United States v. Sims*, 174 F.3d 911 (8th Cir. 1999). The seven other circuits to address the issue held that post-sentencing rehabilitation was an appropriate and relevant basis

for downward departure.[5] The Sentencing Commission resolved the circuit conflict by requiring all courts to follow the Eighth Circuit's rule. *See* USSG §5K2.19, p.s. (post-sentencing rehabilitation, "even if exceptional," is "not an appropriate basis for a downward departure"); USSG App. C, amend. 602 (Nov. 1, 2000).

Following this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Eighth Circuit extended its prohibition against consideration of evidence of post-sentencing rehabilitation from a prohibition applicable to "departures" to a broad prohibition applicable to variances under §3553(a). *See Pepper II*, 486 F.3d at 411, 413 (citing *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007), and *Sims*, 174 F.3d at 913); J.A. 171-72.

Subsequently, in *Gall v. United States*, 552 U.S. 38 (2007), this Court explained that after correctly calculating the guideline range, "the district judge should then consider *all* of the § 3553(a) factors." *Id.* at 49-50 (emphasis supplied). The Court held that it would constitute "significant procedural error" for a judge to "fail[ ] to consider the § 3553(a) factors," *id.*

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[5] *See United States v. Rhodes*, 145 F.3d 1375 (D.C. Cir. 1998); *United States v. Bradstreet*, 207 F.3d 76 (1st Cir. 2000); *United States v. Core*, 125 F.3d 74 (2d Cir. 1997); *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997); *United States v. Rudolph*, 190 F.3d 720 (6th Cir. 1999); *United States v. Green*, 152 F.3d 1202 (9th Cir. 1998); *United States v. Roberts*, No. 98-8037, 1999 WL 13073 (10th Cir. Jan. 14, 1999).

at 51, and that courts of appeals "must review all sentences . . . under a deferential abuse-of-discretion standard," *id.* at 41. The Court then granted Pepper's petition for writ of certiorari in *Pepper II*, vacated the judgment, and remanded the case for further consideration in light of *Gall*. *Pepper v. United States*, 552 U.S. 1089 (2008); J.A. 210.

On remand, the Eighth Circuit declared that "*Gall* does not alter our circuit precedent or our conclusion . . . that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance." *Pepper III*, 518 F.3d at 953; J.A. 218. Applying its own "abuse of discretion" standard, the Eighth Circuit held that in sentencing Pepper, Judge Bennett had committed "procedural error" by considering "improper factors." *Id.* at 952-53; J.A. 215.

On remand, Chief Judge Reade agreed that Pepper had "made substantial positive changes in his life after his original sentencing hearing," but declined to vary on that basis because the court of appeals had "expressly foreclosed Defendant's post-sentencing rehabilitation and behavior from consideration." S.J.A. 39. The court of appeals affirmed based on its precedent: "'[E]vidence of [a defendant's] post-sentence rehabilitation is not relevant and will not be permitted at resentencing.'" *Pepper IV*, 570 F.3d at 965 (internal citations omitted); J.A. 376-77. This Court granted certiorari.

Of the eight circuits that have addressed the issue after *Booker* and *Gall*, only the Eighth and

Eleventh Circuits forbid consideration of post-sentencing rehabilitation.[6] The Eleventh Circuit has questioned the continuing validity of its rule in light of this Court's recent decisions.[7]

The Eighth Circuit's rule conflicts with the fundamental statutes governing sentencing. *See* 18

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[6] *See United States v. Lorenzo*, 471 F.3d 1219, 1221 (11th Cir. 2006) (reversing variance based on post-sentencing rehabilitation in part based on USSG §5K2.19, p.s.). The other circuits to address the issue require or permit, and do not prohibit, consideration of post-sentencing rehabilitation. *See United States v. Hernandez*, 604 F.3d 48, 53-55 (2d Cir. 2010) (district court procedurally erred by failing to consider post-sentencing rehabilitation); *United States v. Arenas*, 340 Fed. Appx. 384, 386 & n.2 (9th Cir. 2009) (district court permitted but not required to consider post-sentencing rehabilitation); *United States v. Jones*, 489 F.3d 243, 252-53 (6th Cir. 2007) (evidence of post-sentencing rehabilitation lends support to downward variance but district court gave it sufficient weight in sentencing at bottom of guideline range); *United States v. Lloyd*, 469 F.3d 319, 324-25 & n.5 (3d Cir. 2006) (district court may consider post-sentencing rehabilitation even on limited *Booker* remand under narrow circumstances; not addressing issue for purposes of an ordinary resentencing); *United States v. Aitoro*, 446 F.3d 246, 255 n.10 (1st Cir. 2006) (district court may consider post-sentencing rehabilitative efforts such as enrollment in employment classes on ordinary remand, though "skeptical" whether appropriate on limited *Booker* remand); *United States v. Scott*, 194 Fed. Appx. 138, 140 (4th Cir. 2006) (affirming sentence imposed on *Booker* remand; noting that district court considered defendant's post-sentencing rehabilitation).

[7] *See United States v. Smith*, 370 Fed. Appx. 59 (11th Cir. 2010) (per curiam) (defendant is "correct that there is a question as to whether *Lorenzo* continues to be good law," but "our circuit's prior precedent rule bars us from overruling *Lorenzo* without en banc consideration").

U.S.C. §§3661, 3553(a). The Eighth Circuit's designation of a sentencing factor as categorically "impermissible" constitutes an improper application of "abuse of discretion" review. Moreover, the Eighth Circuit's justifications for its rule – that post-sentencing rehabilitation is "not relevant" to sentencing, and that considering it would create "disparity" and interfere with the Bureau of Prisons' award of good time credit – are without merit. Accordingly, the Eighth Circuit's judgment should be vacated.

A. The Eighth Circuit's Blanket Rule Against Consideration Of Evidence Of Post-Sentencing Rehabilitation Directly Conflicts With The Controlling Sentencing Statutes.

In *Booker*, this Court held that judicial factfinding under the United States Sentencing Guidelines that enhanced a sentence above the maximum sentence authorized by a jury verdict or guilty plea violated the Sixth Amendment because the Guidelines were mandatory. *Booker*, 543 U.S. at 233-34, 243-44. To remedy the constitutional defect while preserving judicial factfinding, the Court severed and excised two statutory provisions that had made the Guidelines mandatory. *Id.* at 245-65. As a result of the Court's remedial decision, the statutes that now govern sentencing are 18 U.S.C. §§3661 and 3553(a). The Eighth Circuit's rule forbidding judges from considering post-sentencing rehabilitation squarely violates these statutes.

The first statute that governs the question here, and that establishes a district court's authority to consider all facts about a criminal defendant, is §3661. The language of that statute could not be clearer:

> *No limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Id. (emphasis supplied); *see also* 21 U.S.C. §850 (same with reference to Controlled Substance Act cases). By its very terms, §3661 forbids the rule adopted by the Eighth Circuit, because the Eighth Circuit's rule is a court-made "limitation" on the ability of a sentencing judge to consider "the background, character, and conduct of a person convicted of an offense" at the point at which the judge is charged with "imposing an appropriate sentence." The Eighth Circuit had no authority to defy the statute by forbidding a sentencing judge from considering information about a defendant that demonstrates his post-sentencing rehabilitation.

Section 3661 codified a principle articulated in *Williams v. New York*, 337 U.S. 241 (1949), where this Court said: "Highly relevant – if not essential – to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Id.* at 247. This Court later applied this principle to

information that arose after a prior conviction and sentencing: "The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York* . . . that a State may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.'" *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (quoting *Williams*, 337 U.S. at 245, 247), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). Congress specifically chose to include §3661 in the Sentencing Reform Act.[8]

The second statute that invalidates the Eighth Circuit's rule is 18 U.S.C. §3553(a). This Court excised 18 U.S.C. §3553(b)(1) because it imposed binding requirements on sentencing judges. *Booker*, 543 U.S. at 259. This excision left §3553(a) as the governing law in all cases. *Id.* at 266-67 (rejecting proposals in which §3553(a) would control in some cases and §3553(b) would control in others). The Court specified: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those

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[8] Congress initially codified *Williams* in 1970 as 18 U.S.C. §3577 (repealed and renumbered by Pub. L. No. 98-473, Title II, §212(a)(2), Oct. 12, 1984, 98 Stat. 1987), then recodified it in 18 U.S.C. §3661 in the Sentencing Reform Act of 1984. Congress "specifically inserted [§3661] into the [Sentencing Reform] Act." *Booker*, 543 U.S. at 251; *see also id.* at 247 (Congress wrote judicial factfinding "into the Act in 18 U.S.C. §§3553(a) and 3661.").

factors in turn will guide appellate courts . . . in determining whether a sentence is unreasonable." *Id.* at 261. After *Booker*, therefore, all courts must comply with §3553(a) in sentencing proceedings, on direct appeal, and in resentencings upon remand. *Id.* at 267-68.

A sentencing judge must "consider all of the §3553(a) factors" and "make an individualized assessment based on the facts presented." *Gall*, 552 U.S. at 49-50; *see also Rita v. United States*, 551 U.S. 338, 351, 356-57 (2007). The sentencing factors that, under §3553(a), a court "shall consider" plainly include facts about a defendant's rehabilitation after a previous sentencing. Section 3553(a) provides: "The court, in determining the particular sentence to be imposed, *shall* consider – (1) the nature and circumstances of the offense and the *history and characteristics of the defendant*." 18 U.S.C. §3553(a) (emphases supplied). The requirement that a court consider a defendant's history and characteristics is mandatory and contains no limitation. Paragraph (1) is a "broad command," *Gall*, 552 U.S. at 50 n.6, with no exception for "history and characteristics" relating to post-sentencing rehabilitation. Accordingly, sentencing judges are required to consider evidence of post-sentencing rehabilitation under the statute. The Eighth Circuit's prohibition is entirely contrary to the plain language of the statute.

As a historical matter, exceptions to the commands of 18 U.S.C. §§3661 and 3553(a), which require courts to consider a defendant's "background,

character and conduct" and "history and characteristics," have been few, and have been imposed by the Constitution or the pre-*Booker* mandatory Guidelines. It is well-established, for example, that as a constitutional matter, a sentence may not be imposed because of the race of the defendant. *See United States v. Leung*, 40 F.3d 577, 586-87 (2d Cir. 1994). In addition, there were, and still are, a number of policy statements in the Guidelines Manual prohibiting consideration of various aspects of a defendant's life for purposes of "departure," including "[p]ost sentencing rehabilitative efforts, even if exceptional." USSG §5K2.19, p.s.[9]

With the excision of §3553(b), such policy statements, if "pertinent," are just one factor a court may consider under §3553(a).[10] They do not bind the court in imposing a sentence based on the purposes, factors and parsimony principle set forth in §3553(a), often

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[9] *See* USSG §5K2.0(d), p.s. (courts "may not depart" based on lack of youthful guidance and similar circumstances, gambling addiction, personal financial difficulties, economic pressures on a trade or business, acceptance of responsibility, aggravating or mitigating role in the offense, decision to plead guilty or enter into a plea agreement, fulfillment of restitution obligations to the extent required by law, or any other circumstance specifically prohibited as a ground for departure in the guidelines).

[10] The parties may make, and the court may consider, arguments for "departure," or arguments that the factors set forth in §3553(a) warrant a non-Guidelines sentence. *See Rita*, 551 U.S. at 344, 350.

called a "variance."[11] A judge may vary from the guideline range based on factors that the Commission deems never or not ordinarily relevant for purposes of "departure."[12] Apparently recognizing this, the Eighth Circuit does not rely on the Commission's policy statement prohibiting "departure" based on post-sentencing rehabilitation, but rather on its own appellate rule prohibiting not only "departures," but also "variances," on that basis.

In short, the Eighth Circuit's appellate rule purports to do what the Commission's policy statements no longer can. This Court excised §3553(b)(1) specifically because it "ma[de] the Guidelines mandatory." *Booker*, 543 U.S. at 245. The remaining statutory scheme, 18 U.S.C. §§3661 and 3553(a), permits a sentencing judge to consider, without limitation, a defendant's background, character and conduct. The

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[11] *See Irizarry v. United States*, 128 S. Ct. 2198, 2202-03 (2008); 75 Fed. Reg. 27,388, 27,392 (May 14, 2010) ("a sentence that is outside the guidelines framework . . . is considered a 'variance,'" citing *Irizarry*, 128 S. Ct. at 2200-03) (notice of submission to Congress of amendments to Sentencing Guidelines effective Nov. 1, 2010).

[12] In *Gall*, this Court approved a variance based on the defendant's drug abuse at the time of the offense, a prohibited ground for departure, USSG §5H1.4, p.s.; the defendant's voluntary withdrawal from the conspiracy, a basis for an adjustment under USSG §3E1.1 but a prohibited ground for departure, USSG §5K2.0(d)(2), p.s.; and a number of other factors that the Commission's policy statements deemed "not ordinarily relevant" for purposes of departure. *See* USSG §§5H1.1, p.s. (age), 5H1.2, p.s. (education), 5H1.5, p.s. (employment).

purpose of §3661 is on its face to preclude any "limitation" on a judge's power to do so. While there remain invidious factors that are impermissible under the Constitution, they are the only factors that a sentencing court may not consider. The Eighth Circuit had no power to prohibit the district court from considering Jason Pepper's post-sentencing rehabilitation.

B. The Eighth Circuit's Blanket Rule Against Consideration Of Evidence Of Post-Sentencing Rehabilitation Amounts To *De Novo* Review In The Guise Of Abuse-Of-Discretion Review.

To ensure that the guidelines and policy statements would not be made effectively mandatory through appellate review, this Court also excised §3742(e), because it contained "critical cross-references to the (now-excised) §3553(b)(1)" and "depend[ed] upon the Guidelines' mandatory nature." *Booker*, 543 U.S. at 245, 259, 260.[13] The Court replaced §3742(e) with

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[13] In 2003, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, §401(d)(1), 117 Stat. 670 (PROTECT Act), had added *de novo* review of departures and cross-references to §3553(b). The reasons for these revisions, "to make Guidelines sentencing even more mandatory than it had been," had "ceased to be relevant." *Booker*, 543 U.S. at 261. Section 3742 includes a provision regarding resentencing after remand, also added by the PROTECT Act, which provides that "[t]he court shall not impose a sentence outside the applicable guidelines range except upon a ground that – (A) was specifically and affirmatively included in the

(Continued on following page)

an abuse-of-discretion standard called "reasonableness" review.[14] The standard directs "appellate courts to determine whether the sentence 'is unreasonable' with regard to §3553(a)," bearing in mind that "[s]ection 3553(a) . . . sets forth numerous factors that guide sentencing," and "in turn will guide appellate courts . . . in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261. Courts of appeals now "must review all sentences – whether

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written statement of reasons required by section 3553(c) in connection with the previous sentencing . . . and (B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure," 18 U.S.C. §3742(g)(2), with "permissible ground of departure" defined as one that "(B) is authorized under section 3553(b); and (C) is justified by the facts of the case." 18 U.S.C. §3742(j)(1). The government did not rely on §3742(g)(2) in the court of appeals or in its Brief in Opposition to the Petition for Certiorari, with good reason. Although *Booker* did not explicitly excise it, §3742(g)(2) cross-references §3553(b) and contains the same language as §3742(c). As the Court noted, "statutory cross-references to the two sections" that were excised were "consequently invalidated." *Booker*, 543 U.S. at 259. *Booker* made clear that its Sixth Amendment and remedial holdings apply to all cases on direct appeal and on remand for resentencing. *Id.* at 267-68

[14] *See Gall*, 552 U.S. at 46 ("Our explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.") (citing *Booker*, 543 U.S. at 260-62); *Rita*, 551 U.S. at 351 (stating that "appellate 'reasonableness' review merely asks whether the trial court abused its discretion"); *id.* at 361 ("*Booker* replaced the *de novo* standard of review . . . with an abuse-of-discretion standard that we called 'reasonableness' review.") (Stevens, J., joined by Ginsburg, J., concurring).

outside, just outside, or significantly outside the Guidelines range – under [this] deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 41. The Eighth Circuit's ad hoc creation of categorical exceptions to §3553(a) is directly at odds with this Court's rulings and the discretion they bestow on district courts.

Nothing in this Court's decisions suggests that in applying abuse-of-discretion review, a court of appeals may deem any factor encompassed by §3553(a) to be "not relevant," "improper," or "not permitted." Indeed, it constitutes "significant procedural error" for a district court to "*fail*[ ] to consider the §3553(a) factors." *Gall*, 552 U.S. at 51 (emphasis supplied); *see also Rita*, 551 U.S. at 366 (Stevens, J., joined by Ginsburg, J., concurring) (the "standard of review allows – indeed, requires – district judges to consider *all* of the factors listed in § 3553(a).").

An appellate rule declaring that a §3553(a) factor is "not relevant and will not be permitted" under any set of facts, *Pepper IV*, 570 F.3d at 965; J.A. 377, conflicts with the very reasons this Court adopted a deferential abuse-of-discretion standard.[15] The

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[15] The Court adopted this standard based on the structure of §3553(a); on practical considerations regarding the judicial actor best suited to decide the issues under §3553(a); and on the pre-2003 standard of review for departures and sentences with no applicable guideline, 18 U.S.C. §3742(e) (2000 ed.). *Booker*, 543 U.S. at 260-62 (citing *Pierce v. Underwood*, 487 U.S. 552, 558-60 (1988); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403-05 (1990); and *Koon v. United States*, 518 U.S. 81, 99 (1996)).

"[p]ractical considerations" that "underlie this legal principle" are that the "sentencing judge is in a superior position to find facts and judge their import under §3553(a)," because he "sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record," "has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court," and has "an institutional advantage over appellate courts in making these sorts of determinations, especially as [district courts] see so many more Guidelines sentences than appellate courts do." *Gall*, 552 U.S. at 51-52 (internal citations and quotation marks omitted); *see also Rita*, 551 U.S. at 357-58.

The Eighth Circuit's rule contradicts this rationale. Here, as in *Gall*, the Eighth Circuit "stated that the appropriate standard of review was abuse of discretion," but "engaged in an analysis that more closely resembled *de novo* review . . . and determined that, in its view, the . . . variance was not warranted." *Gall*, 552 U.S. at 56. It did so this time by ruling as a matter of circuit law that the facts of Pepper's post-sentencing rehabilitation were categorically not relevant, completely usurping the sentencing judge's factfinding role. The Eighth Circuit was not free to invent this exception to §3553(a) in the guise of applying abuse-of-discretion review. This is not a proper application of the abuse-of-discretion standard described in *Booker*, *Rita*, and *Gall*.

C. Even If The Eighth Circuit Had The Power To Deem Factors Within The Scope Of §§3661 And 3553(a) Impermissible, Its Justifications For Prohibiting Consideration Of Post-Sentencing Rehabilitation Are Without Merit.

In *Sims*, the Eighth Circuit posited three reasons for prohibiting downward departures based on post-sentencing rehabilitation: (1) evidence that did not exist at the time of the initial sentencing is "not relevant"; (2) such departures would create "disparity" between "lucky defendants" who receive resentencings and those who do not; and (3) such departures "may interfere" with the Bureau of Prisons' authority to calculate good time credit. *Sims*, 174 F.3d at 912-13. Before the Sentencing Commission issued a policy statement making the Eighth Circuit's rule mandatory on sentencing judges across the country, all other courts of appeals to consider these rationales had found them to be without merit.[16] The Eighth Circuit has offered no further or different justifications since then.

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[16] *See Bradstreet*, 207 F.3d at 81-83; *Rudolph*, 190 F.3d at 723-25; *Roberts*, 1999 WL 13073, at *6; *Green*, 152 F.3d at 1207-08; *Rhodes*, 145 F.3d at 1381-82; *Core*, 125 F.3d at 77-78; *see also Sally*, 116 F.3d at 79-80 (upholding consideration of post-sentence rehabilitation solely on the basis of *Koon* without addressing these arguments).

1. Pepper's Post-Sentencing Rehabilitation Is Highly Relevant To The Statutory Sentencing Factors.

The Eighth Circuit declared that rehabilitation that "takes place behind the prison walls after the original sentencing . . . is not relevant, since the sentencing court obviously could not have considered it at the time of the original sentencing." *Sims*, 174 F.3d at 913. This remains the primary rationale for the Eighth Circuit's rule, whether the rehabilitation takes place in prison or in the community. *See Pepper IV*, 570 F.3d at 965 (evidence of post-sentencing rehabilitation is "not relevant and will not be permitted at resentencing because the district court could not have considered that evidence at the time of the original sentencing."); J.A. 376-77.

This rationale cannot withstand scrutiny, first because it is not accurate as a factual matter, and second because it is without support in the circuit's own case law and is contrary to this Court's decisions and the law of other circuits.

First, contrary to the Eighth Circuit's conclusion, evidence of post-sentencing rehabilitation is highly relevant to the purposes of sentencing set forth in §3553(a)(2). In this case, Pepper successfully conquered the drug addiction that motivated his offense, completed college courses for which he earned top grades, excelled in his job and was promoted, reunited with his father, married, and supported his wife and her young daughter. J.A. 94-95, 104-12, 116-21,

124-31, 133-34, 143-50, 301-05, 320-21, 323-28; S.J.A. 19-23. In doing so, he far exceeded the minimum requirements of his supervised release. J.A. 53-57, 155-59. That he achieved these goals constitutes powerful evidence that a sentence of 24 months was "sufficient" to satisfy the need for the sentence imposed to effectuate specific deterrence, protect the public from further crimes of the defendant, and achieve his rehabilitation in the most effective manner. *See* 18 U.S.C. §3553(a)(2)(B), (C), (D). Indeed, the Sentencing Commission's empirical research confirms that several of the factors implicated in Pepper's post-sentencing rehabilitation – abstinence from drugs, college education, stable employment, and marriage – predict a greatly reduced risk of recidivism.[17] "[T]here would seem to be no better evidence" for a sentencing court to consider in "assessing at least three of the Section 3553(a) factors, deterrence, protection of the public and rehabilitation." *United States v. McMannus*, 496 F.3d 846, 853 (8th Cir. 2007) (Melloy & Smith, JJ., concurring). In addition, Pepper's rehabilitation is evidence of his basic good character, that his offense was driven by difficult personal circumstances, and that he was less culpable than a

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[17] U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & exh. 10 (May 2004).

person who sells drugs out of sheer greed.[18] *See* 18 U.S.C. §3553(a)(2)(A).

Pepper's rehabilitation obviously is relevant to the fundamental question of what sentence is "sufficient, but not greater than necessary" to achieve the purposes of sentencing. 18 U.S.C. §3553(a). The clear import of Pepper's actions is that he is highly unlikely to recidivate, is not a danger to society, and has been rehabilitated in the most effective manner. J.A. 124-31, 133-34, 145-47, 149-50; S.J.A. 20-23. "The successful rehabilitation of a criminal . . . is a valuable achievement of the criminal process," *Core*, 125 F.3d at 78, which judges must now take into account, *see* 18 U.S.C. §3553(a)(1), (a)(2)(B), (C), (D).

Returning Pepper to prison now would be entirely counterproductive. As one perceptive district judge put it in a similar case in the early days of the Guidelines:

> The rehabilitation of a drug addict by his act of will is no mean accomplishment. Because of it, his children and wife have recovered

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[18] Adequate retribution should reflect not only the "nature and seriousness of the harm caused or threatened by the crime," but also the "offender's degree of culpability in committing the crime, in particular, his degree of intent (mens rea), motives, role in the offense, and mental illness or other diminished capacity." Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590 (2005).

> their father, husband and provider, and society has regained a productive citizen. It appears society has nothing to fear from him, as it seems most unlikely he will now throw away his rehabilitation and return to drugs. The imposition of a year's jail sentence would serve no end, but ritualistic punishment with a high potential for destruction. Indeed, putting the defendant in jail for a year would be the cause most likely to undo his rehabilitation.

United States v. Rodriguez, 724 F. Supp. 1118, 1119 (S.D.N.Y. 1989) (Leval, J.). To prohibit consideration of these important factors in Pepper's case is inconsistent with the purposes of §3553(a), and "may work to promote not respect, but derision, of the law," which may then be "viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Gall*, 552 U.S. at 54.

Second, the only reason the Eighth Circuit gave for deciding that evidence that did not exist at the original sentencing is "not relevant" is without support in the circuit's own case law and is contrary to this Court's decisions and the law of other circuits.

The reason for this rule, the Eighth Circuit said, was that two of its prior decisions permit a court to hear on remand any relevant evidence that it could have heard at the first sentencing on an issue that was reversed. *Sims*, 174 F.3d at 913. The cases cited, however, do not stand for the negative implication

that the *Sims* court drew, that district courts may *not* consider evidence that did *not* exist at the original sentencing, much less on an issue that was not decided on appeal. Instead, they address the law of the case and the scope of arguments and evidence that a district court may consider regarding issues that were actually *decided* by the court of appeals. *See United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992); *United States v. Behler*, 100 F.3d 632 (8th Cir. 1996).[19] Neither case addresses whether a district court may consider evidence that did not exist at the time of the initial sentencing, much less evidence regarding an issue that was not (and could not have been) decided by the court of appeals. *See Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) ("The doctrine of law of the case comes into play only with respect to issues previously

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[19] Specifically, these cases stand for the proposition that a district court may reconsider *de novo* any issue left open by the court of appeals, including any new evidence and arguments that it could have heard at the initial sentencing *on that issue*, but that it may not hear fresh evidence or argument on an issue that was decided by the court of appeals. *See Cornelius*, 968 F.2d at 705-06 (holding that district court could consider on remand any evidence regarding whether defendant qualified as an Armed Career Criminal because district court's previous determination on that issue had been reversed and remanded for reconsideration, but it could not hear new evidence and arguments regarding whether defendant qualified as a career offender, as district court's determination on that issue had been affirmed); *Behler*, 100 F.3d at 635 (holding that district court could not, under law of the case and scope of the remand, consider fresh evidence and arguments regarding drug quantity calculation, which had been affirmed).

determined."); *United States v. Vanhorn*, 344 F.3d 729, 731-32 (8th Cir. 2003) (same). Indeed, other Eighth Circuit decisions allow a district court to consider evidence that did not exist at the time of the initial sentencing,[20] in keeping with the broad principle that a sentencing judge is free "to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence." *Pearce*, 395 U.S. at 723; *see also Wasman v. United States*, 468 U.S. 559, 572 (1984) ("[F]ollowing a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings.").

Finally, the rule the Eighth Circuit inferred in *Sims* is inconsistent with the law of other circuits that at a resentencing, a "court's duty is always to sentence the defendant as he stands before the court on the day of sentencing." *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000). In *United States v. Quintieri*, 306 F.3d 1217, 1230 (2d Cir. 2002), for

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[20] *See United States v. Stapleton*, 316 F.3d 754, 757 (8th Cir. 2003) (allowing consideration of "post-sentencing obstructive conduct" as basis for obstruction-of-justice enhancement); *United States v. Walker*, 920 F.2d 513, 518 (8th Cir. 1995) (describing district court's consideration at resentencing of evidence of defendant's rehabilitation in prison); *United States v. Durbin*, 542 F.2d 486, 489-90 (8th Cir. 1976) ("[I]t was within the discretion of the district court to consider events occurring subsequent to the appellant's original sentencing.") (citing *Williams*, 337 U.S. at 247).

example, the Second Circuit made clear that even within the constraints of a limited remand, a district court may consider events occurring after the initial sentencing, such as the death of a spouse, that implicate issues not decided at the initial sentencing – *e.g.*, the appropriateness of a departure based on extraordinary family circumstances.[21] Similarly, in *United States v. Buckley*, 251 F.3d 668 (7th Cir. 2001), the Seventh Circuit emphasized that even its limited remand order "did not preclude the judge's consideration of extraordinary unforeseen events occurring after the original sentencing, events not before us when we remanded the case, to the extent they bore on the sentence." *Id.* at 670 (citing *Pearce*).[22] Decisions in virtually every other circuit confirm

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[21] *See also Hernandez*, 604 F.3d at 54 (even under a limited remand, district court may consider "an issue [that] became relevant only after the initial appellate review," such as defendant's rehabilitation since original sentencing); *United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002) (upholding district court's consideration on remand of evidence that defendant murdered confidential informant to prevent him from testifying, stating that "even where the appellate court remands a case with specific limiting instructions, such a mandate does not 'preclude' a departure based on intervening circumstances"); *Bryson*, 229 F.3d at 426 (district court erred in declining to consider rehabilitation between first and second sentencing); *Core*, 125 F.3d at 78 (district court may consider post-sentencing rehabilitation).

[22] *See also United States v. Bell*, 280 Fed. Appx. 548, 550 (7th Cir. 2008) (affirming district court's consideration of evidence of events occurring while case was on appeal for purposes of finding aggravating factor that did not previously exist).

this principle.[23] These courts, unlike the Eighth Circuit, correctly recognize that consideration of evidence not available at the initial sentencing is consistent with the principle that "the punishment should fit the offender and not merely the crime." *Pearce*, 395 U.S. at 723 (internal quotation marks omitted).

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[23] *See, e.g.*, *Aitoro*, 446 F.3d at 255 n.10 (district court may consider post-sentencing rehabilitation at ordinary resentencing); *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001) (same); *Bradstreet*, 207 F.3d at 81-83 (same); *Lloyd*, 469 F.3d at 324 (same); *Sally*, 116 F.3d at 80 (same); *Scott*, 194 Fed. Appx. at 140 (same); *United States v. Reinhart*, 442 F.3d 857, 859 (5th Cir. 2006) (affirming higher sentence on remand based in part on defendant's conduct while incarcerated); *Puente v. United States*, 676 F.2d 141, 145 (5th Cir. 1982) ("[I]t is common practice in resentencing to take into consideration events and conduct occurring subsequent to the original sentence.") (citing *Pearce*) (internal quotation marks omitted); *Jones*, 489 F.3d at 252-53 (district court may consider post-sentencing rehabilitation on remand); *Rudolph*, 190 F.3d at 723-27 (same); *United States v. Butler*, 221 Fed. Appx. 616, 617-18 (9th Cir. 2007) (same); *Green*, 152 F.3d at 1207 (same); *United States v. Jones*, 114 F.3d 896, 897 (9th Cir. 1997) (upholding consideration of evidence that did not exist at time of initial sentencing showing that defendant's financial situation had improved) (citing *Pearce*); *Roberts*, 1999 WL 13073, at **6-7 (district court may consider post-sentencing rehabilitation); *Rhodes*, 145 F.3d at 1381 (same); *id.* at 1377-78 (unless expressly directed otherwise, at resentencing district courts may consider "only such new arguments or new facts as are made newly relevant by the court of appeals' decision – whether by the reasoning or by the result," but a defendant is not held to have "waived an issue if he did not have reason to raise it at his original sentencing").

2. Permitting Consideration Of Post-Sentencing Rehabilitation Does Not Create Unwarranted Disparity.

Another of the Eighth Circuit's justifications for prohibiting consideration of post-sentencing rehabilitation was that such consideration would create "disparity" because "lucky defendants," through the "fortuity" of a "legal error in their original sentencing, receive a windfall," while other defendants "with identical or even superior prison records" receive "only the limited good-time credits available under 18 U.S.C. § 3624." *Sims*, 174 F.3d at 912-13. The Eighth Circuit continues to cite this rationale. *See Pepper IV*, 570 F.3d at 965; J.A. 376-77. But the rule, rather than *preventing* unwarranted disparity, creates it.

Differences in sentencing that arise because of the ordinary operation of the criminal justice system are quite common and accepted. For example, disparity arising from the ordinary exercise of prosecutorial discretion is not unwarranted. *United States v. LaBonte*, 520 U.S. 751, 761-62 (1997). That more culpable defendants have greater knowledge with which to obtain credit for substantial assistance to the government than do less culpable defendants is not deemed unfair.[24] Defendants sentenced or resentenced on remand after *Booker* are entitled to be

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[24] *See, e.g.*, *United States v. Lindo*, 335 Fed. Appx. 663, 664-65 (8th Cir. 2009); *United States v. Due*, 205 F.3d 1030, 1033-34 (8th Cir. 2000); *United States v. Polanco*, 53 F.3d 893 (8th Cir. 1995).

sentenced under the *Booker* remedy, *Booker*, 543 U.S. at 267-68, while those whose sentences became final before *Booker* are not. *Dillon v. United States*, 130 S. Ct. 2683 (2010). Likewise, the fact that one defendant, because of a successful appeal by one side or the other, has an opportunity to present evidence of rehabilitation that occurred after a previous sentencing, is not unfair simply because another defendant's case was not appealed at all or was affirmed. *See Bradstreet*, 207 F.3d at 82-83; *Rudolph*, 190 F.3d at 724; *Green*, 152 F.3d at 1207 & n.6; *Rhodes*, 145 F.3d at 1381. Indeed, it is appropriate for sentencing courts to consider "the need to avoid unwarranted *similarities*" where different defendants are "not similarly situated." *Gall*, 552 U.S. at 55 (emphasis in original).

The Eighth Circuit's blanket rule not only prohibits its judges from finding relevant facts and judging their import under §3553(a), *see Gall*, 552 U.S. at 51, including assessing any disparities in light of those facts, *see Kimbrough v. United States*, 552 U.S. 85, 108 (2007), but actually promotes unwarranted disparity in at least two ways.

First, the Eighth Circuit's rule operates as a one-way ratchet, prohibiting consideration of evidence of *good* post-sentencing conduct, while permitting courts to consider evidence of *bad* post-sentencing conduct. *See Stapleton*, 316 F.3d at 757 ("Although our precedent 'prohibits consideration of post-sentencing rehabilitation at resentencing' as the basis for a downward departure . . . we . . . allow consideration

of post-sentencing obstructive conduct" to enhance a defendant's sentence) (citation omitted).

Second, the rule draws an arbitrary distinction between quite similar conduct, rehabilitation that occurs before sentencing and rehabilitation that occurs after sentencing, based on an alleged "disparity" of little significance.[25] The Eighth Circuit has always permitted judges to consider post-*offense* (but pre-initial-sentencing) rehabilitation. *See Sims*, 174 F.3d at 913; *United States v. McMannus*, 262 Fed. Appx. 732 (8th Cir. 2008). Unlike other circuits, however,[26] the Eighth Circuit continues to prohibit consideration of post-*sentencing* rehabilitation, because of the alleged "disparity" it causes. But there is an equivalent "disparity" in the case of post-*offense* rehabilitation that the Eighth Circuit appropriately treats as insignificant. The opportunity to show post-offense rehabilitation depends largely on whether the defendant is released to the community, where rehabilitative efforts are most easily accomplished, or is instead detained in a pretrial detention facility, where opportunities for rehabilitation are virtually non-existent.[27] For example, in *Gall*, this Court upheld a

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[25] *See Rudolph*, 190 F.3d at 723 (rejecting rationale); *Roberts*, 1999 WL 13073, at *6 n.1 (same); *Green*, 152 F.3d at 1207 (same); *Sally*, 116 F.3d at 80 (same).

[26] *See Hernandez*, 604 F.3d at 53-55; *Arenas*, 340 Fed. Appx. at 386 & n.2; *Jones*, 489 F.3d at 252-53; *Lloyd*, 469 F.3d at 324-25; *Aitoro*, 446 F.3d at 255 n.10; *Scott*, 194 Fed. Appx. at 138.

[27] *See McGinnis v. Royster*, 410 U.S. 263, 273 (1973).

variance based on post-offense rehabilitation, some of which took place while Gall was on pretrial release, 552 U.S. at 41-42, 44, a status many of those charged with crime never enjoy. Because the availability of pretrial release is no less "fortuitous" than the presence of a legal error in the original sentencing that results in resentencing, the Eighth Circuit's designation of the latter condition as an unfair "windfall" creating "disparity," even as it agrees that the former condition may be permitted to affect the sentence, cannot be sustained. Common distinctions in the situations of different defendants simply do not create unwarranted disparities that mandate that all defendants be treated equally harshly.

The Eighth Circuit's rule thus does not prevent any "unwarranted" disparity, but instead creates it.

3. Consideration Of Post-Sentencing Rehabilitation Does Not Interfere With The Bureau Of Prisons' Authority To Award Good Time Credit.

Contrary to the Eighth Circuit's final justification, judicial consideration of post-sentencing rehabilitation in no way interferes with the Bureau of Prisons' authority to award good time credit for "'exemplary compliance with institutional disciplinary regulations.'" *Sims*, 174 F.3d at 913 (quoting 18 U.S.C. §3624(b)(1)). The Bureau of Prisons has no power to award good time credit for conduct that exceeds compliance with its disciplinary regulations,

much less for conduct that occurs after a sentence is served. *Barber v. Thomas*, 130 S. Ct. 2499, 2505 (2010). Pepper was awarded good time credit for complying with the Bureau of Prisons' regulations. The evidence of rehabilitation that should have been permitted to be taken into account at his resentencing was that he engaged in substantial rehabilitative efforts after he completed his term of imprisonment. "Upon resentencing, the district court pronounces a firm, unadjustable sentence that the Bureau of Prisons is to carry out; that the court took into account post-sentence rehabilitation is irrelevant to the Bureau's function." *Bradstreet*, 207 F.3d at 83; *see also Rhodes*, 145 F.3d at 1380-81.

In sum, not one of the Eighth Circuit's rationales for its blanket rule forbidding consideration of post-sentencing rehabilitation is sound. Because the rule violates the controlling statutes as well as the important principles set forth in *Booker*, *Rita*, *Kimbrough*, and *Gall*, the rule should be definitively rejected and the Eighth Circuit's judgment vacated.

II. THE COURT OF APPEALS ERRED IN UPHOLDING CHIEF JUDGE READE'S OVERRULING OF JUDGE BENNETT'S FINDING REGARDING PEPPER'S SUBSTANTIAL ASSISTANCE; A WELL-ESTABLISHED COMPONENT OF THE LAW OF THE CASE DOCTRINE BARS A DISTRICT JUDGE FROM OVERTURNING A RULING ISSUED BY ANOTHER DISTRICT JUDGE IN THE SAME CASE EXCEPT IN SPECIAL CIRCUMSTANCES AND FOR COMPELLING REASONS.

Following the Eighth Circuit's initial remand in this case, then-Chief Judge Bennett carefully reconsidered all of the pertinent sentencing factors, including the value of the substantial assistance that Pepper had provided to law enforcement. He found that this last factor alone warranted a downward departure to a sentence of 58 months' imprisonment, which he characterized as a 40% departure. J.A. 139-44. This was a finding in essence that, without considering other factors, a 58-month sentence was "sufficient" to carry out the purposes of §3553(a). Although the Eighth Circuit remanded the case on other grounds, it did not disturb this finding, concluding that it was "reasonable." *Pepper II*, 486 F.3d at 411, J.A. 167-68; *Pepper III*, 518 F.3d at 951, J.A. 213. At the subsequent resentencing, however, Chief Judge Reade, to whom the case had been reassigned, rejected Judge Bennett's finding. She held, without any apparent consideration of Judge Bennett's rationale or any finding that compelling circumstances

warranted a deviation from his ruling, that a departure to 58 months' imprisonment on this basis was excessive under §3553(a), because Pepper's assistance had not been "extraordinary."[28] S.J.A. 32-33. Departing solely on the basis of substantial assistance, Chief Judge Reade found that a sentence of 77 months' imprisonment was appropriate under §3553(a).[29] J.A. 331-34.

In light of these circumstances, Chief Judge Reade's sentence was imposed in violation of the law of the case doctrine. That doctrine provides that, as a general rule, a district judge should not alter another district judge's previous rulings in the case without a compelling justification for doing so. Here, however, Chief Judge Reade found that a substantially higher sentence was required for the sentence to be "sufficient," §3553(a), given Pepper's cooperation, than Judge Bennett had. The record shows no reason for this change, other than Chief Judge Reade's apparent disagreement with Judge Bennett's ruling.

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[28] Nothing in the Commission's policy statement advises judges to evaluate the extent of substantial assistance departures according to whether cooperation was "extraordinary." USSG §5K1.1, p.s. The Eighth Circuit, in light of *Gall*, overruled its former standard of review of the extent of substantial assistance departures, which had asked whether a defendant's cooperation was "extraordinary." *United States v. Burns*, 577 F.3d 887, 896 (8th Cir. 2009) (en banc).

[29] Chief Judge Reade applied a further departure pursuant to Fed. R. Crim. P. 35(b) for additional assistance to law enforcement that Pepper had provided following his prior sentencing, for a total sentence of 65 months' imprisonment.

The law of the case doctrine generally provides that "a court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236 (1997). Pursuant to this doctrine, parties to litigation are normally entitled to expect that "'[t]he *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*.'" *PNC Fin. Servs. Group, Inc. v. Comm'r of Internal Revenue Serv.*, 503 F.3d 119, 126 (D.C. Cir. 2007) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc)).

Federal courts have long recognized that an important component of this doctrine directs district judges to refrain from overturning rulings issued by a fellow district judge in the same case except in "special circumstances," *Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002), and for "compelling reasons," *Best v. Shell Oil Co.*, 107 F.3d 544, 546 (7th Cir. 1997). *Accord Dictograph Prods. Co. v. Sonotone Corp.*, 230 F.2d 131, 134-36 (2d Cir. 1956) (L. Hand, J.); *Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3d Cir. 1994); *Prack v. Weissinger*, 276 F.2d 446, 450 (4th Cir. 1960); *Stevenson v. Four Winds Travel, Inc.*, 462 F.2d 899, 904-05 & n.4 (5th Cir. 1972); *Gillig v. Advanced Cardiovascular Sys., Inc.*, 67 F.3d 586, 589-90 (6th Cir. 1995); *Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 220 (8th Cir. 1941); *United States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970); *Travelers Indem. Co. v. United States*, 382 F.2d 103, 106-07 (10th Cir. 1967); *Technical Res. Servs., Inc. v. Dornier Med. Sys., Inc.*, 134 F.3d 1458, 1465 n.9 (11th Cir.

1998); *Guerrieri v. Herter*, 186 F. Supp. 588, 590 (D.D.C. 1960); *see also* John A. Glenn, Annotation, *Propriety of Federal District Judge's Overruling or Reconsidering Decision or Order Previously Made in Same Case by Another District Judge*, 20 A.L.R. FED. 13 (Westlaw 2009) (hereinafter "*Glenn Annotation*") (citing cases); 18B Charles A. Wright *et al.*, *Federal Practice and Procedure* §4478.1 (Westlaw 2010) (hereinafter "*Federal Practice and Procedure*").

This facet of the law of the case doctrine advances a number of important policies. It "'reflects the rightful expectation of litigants that a change of judge midway through a case will not mean going back to square one.'" *Brengettcy v. Horton*, 423 F.3d 674, 680 (7th Cir. 2005) (quoting *Best*, 107 F.3d at 546, and citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). It protects the "orderly functioning of the judicial process." *Ellis*, 313 F.3d at 646 (citing *Stevenson*, 462 F.2d at 904-05). It "affords litigants a high degree of certainty as to what claims are – and are not – still open for adjudication." *Id.* at 647 (citing *Best*, 107 F.3d at 546, and *Christianson*, 486 U.S. at 816-17). It "furthers the abiding interest shared by both litigants and the public in finality and repose." *Id.* (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992)). And it recognizes that "judges who too liberally second-guess their co-equals effectively usurp the appellate function and embolden litigants to engage in judge-shopping and similar forms of arbitrage." *Id.* (citing *United States v. Erwin*, 155 F.3d 818, 825 (6th Cir. 1998), *White v. Higgins*, 116 F.2d

312, 317-18 (1st Cir. 1940), and *Federal Practice and Procedure* §4478.1, at 695); *accord Dictograph Prods.*, 230 F.2d at 135 (noting that, absent the rule, "the defeated party may shop about in the hope of finding a judge more favorably disposed"); *see also Glenn Annotation* §4. The Eighth Circuit itself has eloquently described the rule as "essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration of the law." *Plattner Implement Co. v. Int'l Harvester Co. of America*, 133 F. 376, 378-79 (8th Cir. 1904).

As with the remainder of the law of the case doctrine, the rule is not a limitation on courts' power, *Messinger v. Anderson*, 225 U.S. 436, 444 (1912), nor is it inflexible. Courts have recognized that the rule is not breached, for example, when a district judge revisits an earlier judge's ruling where that ruling was "made on an inadequate record or was designed to be preliminary or tentative," *Ellis*, 313 F.3d at 647 (citing *Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985)), where there has been a "material change in controlling law," *id.* at 648 (citing *Tracey v. United States*, 739 F.2d 679, 682 (1st Cir. 1984), and *Crane Co. v. Am. Standard, Inc.*, 603 F.2d 244, 248 (2d Cir. 1979)), where "newly discovered evidence bears on the question," *id.* (citing *Fisher v. Trainor*, 242 F.3d 24, 29 n.5 (1st Cir. 2001), and *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1096 (9th Cir. 1994)), and where reconsideration is appropriate "to avoid manifest injustice," *id.* (citing *Christianson*, 486 U.S. at 817). The introduction

of new evidence respecting a defendant's post-sentencing rehabilitation, for example, would constitute a proper ground for modifying an earlier sentencing determination regardless of whether there has been a change of judge, both because the issue was not actually ruled on at the initial sentencing, and because the new evidence bears on the appropriate sentence and the need to avoid a manifest injustice. *Id.*; *cf. Burrell v. United States*, 467 F.3d 160, 165 n.3 (2d Cir. 2006) (Sotomayor, J.) (noting that court's reconsideration of prior rulings may be appropriate in circumstances involving change of law, new evidence, or need to correct clear error or prevent manifest injustice).

But the rule's essence is that a mere "doubt about the correctness of a predecessor judge's rulings," a "belief that the litigant may be able to make a more convincing argument the second time around," or a "'doctrinal disposition' to decide the issue differently" does not constitute an adequate ground for a district judge to jettison another district judge's ruling. *Ellis*, 313 F.3d at 648-49 (quoting *Agostini*, 521 U.S. at 236); *accord Williams v. Comm'r of Internal Revenue*, 1 F.3d 502, 503 (7th Cir. 1993) (Posner, J.) (noting that district judge is not free to alter earlier judge's ruling "merely because he has a different view of the law or facts from the first judge").

Here, Chief Judge Reade's basis for deviating from Judge Bennett's finding was at best a mere "doubt about the correctness of [her] predecessor's ruling." *Ellis*, 313 F.3d at 648-49. The record here is

devoid of any justification, beyond Chief Judge Reade's disagreement with Judge Bennett's ruling regarding the value of Pepper's substantial assistance, for Chief Judge Reade to discard Judge Bennett's ruling and consider the matter "de novo." J.A. 207. Chief Judge Reade noted that the court of appeals' remand order did not obligate her to leave that ruling in place, J.A. 206-08, S.J.A. 29-30, but she identified no special or compelling justification for overturning it. *Ellis*, 313 F.3d at 646; *Best*, 107 F.3d at 546. Indeed, Chief Judge Reade gave no indication that she even *considered* Judge Bennett's careful evaluation of the value of Pepper's substantial assistance when she arrived at her new, and substantially lower, valuation. S.J.A. 32-33. The law of the case doctrine is designed to prevent precisely this sort of blithe expungement of a co-equal judge's carefully-reasoned conclusion. *Glenn Annotation* §4 (citing cases).

In addition, Chief Judge Reade's unexplained deviation from Judge Bennett's ruling conflicts with other important policies behind the law of the case doctrine. One such purpose of the rule is to ensure public "confidence in the adjudicatory process" by eliminating the appearance of arbitrariness that would result from readily permitting courts to deviate from prior rulings in the same case. *Ellis*, 313 F.3d at 647 (citing Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 Iowa L. Rev. 81, 88 (1984) (hereinafter "*Hazard*")). Chief Judge Reade's casual deviation from a prior ruling of

a fellow district judge undermined public confidence in judicial proceedings, for "reconsideration of previously litigated issues, absent strong justification, spawns inconsistency and threatens the reputation of the judicial system." *Id.* (citing *Hazard* at 88). A district judge's deviation from a prior sentence, which had been fully justified by the original sentencing judge, without any compelling explanation for the alteration, suggests that criminal sentencing can depend on a mere change in judicial personnel. Such a result not only taints the appearance of justice, but may impair the actuality of justice as well.

The need for adhering to the law of the case to preserve the appearance of justice is particularly acute where, as here, a successor judge is sentencing a defendant after the original sentencing judge has been removed from the case by the court of appeals. In some cases, the reasons for reassignment are clear. *See, e.g., Leung*, 40 F.3d at 586-87 (reassignment required to preserve appearance of justice where original judge's statements suggested race played an improper role in sentencing). But in others, the reasons for reassignment are less obvious. In this case, for example, although Judge Bennett expressed unhappiness with the prospect of being required to impose a higher sentence by the court of appeals, he repeatedly emphasized that he would be able and willing to conduct a resentencing in accord with the appellate court's instructions, should a resentencing be ordered. J.A. 148-50 ("I won't like it, but I'll be happy to do it. . . . I'll impose it if they make me. . . .

[I]f I have to do it, I have to do it."); *cf. Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring in the judgment) ("[W]e accept the notion that the 'conscientious judge will, as far as possible, make himself aware of his biases [toward vindicating his prior conclusion], and, by that very self-knowledge, nullify their effect.'") (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (2d Cir. 1943)). In this latter type of case, there should be a real concern that a "reasonable observer," *Leung*, 40 F.3d at 586-87, might conclude that the reassignment was arbitrary or reflected appellate displeasure with the manner in which the district court exercised, or might exercise, the substantial discretion that this Court's rulings confer on him at sentencing. *See Gall*, 552 U.S. at 41, 51-52, 56. The law of the case doctrine is designed to dispel any concerns that criminal sentences may be arbitrarily affected by the choice of judicial personnel.

In rejecting Pepper's argument that this aspect of Chief Judge Reade's ruling violated the law of the case doctrine, the Eighth Circuit relied solely on the fact that its remand order did not require Chief Judge Reade to leave this part of Judge Bennett's ruling in place. *Pepper IV*, 570 F.3d at 963-64; J.A. 372-74. The appellate court failed to understand that, even if *its remand order* did not obligate Chief Judge Reade to leave Judge Bennett's ruling in place, the *law of the case doctrine* did, at least in the absence of special

and compelling reasons to overturn that ruling.[30] Nor may the Eighth Circuit's error be dismissed as immaterial on the theory that it was entitled to affirm Chief Judge Reade's ruling as long as it was correct, notwithstanding the law of the case doctrine. This argument would carry some weight if the standard of appellate review were plenary, *cf. Peterson*, 765 F.2d at 704, but this Court made plain in *Gall* that district court exercises of sentencing discretion are entitled to substantial deference. *Gall*, 552 U.S. at 41. With respect to a discretionary ruling such as this, even if both judges' determinations qualify as reasonable, "the law of the case doctrine . . . require[s] the court of appeals to defer to the *first* judge's ruling." *Williams*, 1 F.3d at 503-04 (citing *Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1137-38 (6th Cir. 1991)) (emphasis supplied).

This Court should accordingly reverse the Eighth Circuit's affirmance of Chief Judge Reade's overturning of Judge Bennett's valuation of Pepper's substantial assistance to law enforcement.

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[30] The government made the same error in its Brief in Opposition to the Petition for Certiorari. *See* Brief in Opp. to Cert. at 9-10. The question here is not whether Chief Judge Reade's decision violated the Eighth Circuit's remand order; it is whether it violated the law of the case doctrine, which under the circumstances required it to adhere to Judge Bennett's decision on the appropriate sentence in light of Pepper's assistance to law enforcement.

CONCLUSION

This Court has broad power to "set aside or reverse" the judgment brought before it and to "direct the entry of such appropriate judgment, decree, or order . . . as may be just under the circumstances." 28 U.S.C. §2106. Based on Issues I and II, the Court should exercise this power to set aside the judgment of the Eighth Circuit in *Pepper IV*.

In this unusual case, the Court should also issue an order, "just under the circumstances," to reinstate the second 24-month sentence imposed by Judge Bennett. Following Judge Bennett's imposition of his second 24-month sentence, the Eighth Circuit reversed, and this Court vacated the Eighth Circuit's judgment and remanded in light of *Gall*. Every proceeding since the Court's remand has, as shown above, been inconsistent with the principles set forth in *Gall*. The Court should reinstitute that 24-month sentence, the only judgment consistent with *Gall* and this Court's precedents. *Cf. Grosso v. United States*, 390 U.S. 62, 71-72 (1968) (where reversal of petitioner's conviction was "inevitable" in view of Court's holding, case should be "finally disposed of at this level," under 28 U.S.C. §2106); *Tinder v. United States*, 345 U.S. 565, 570 (1953) (remanding case "to the District Court to correct the sentence" where petitioner was improperly convicted of a felony; citing 28 U.S.C. §2106 and Court's power "to do justice as the case requires"). It would not be "just under the

circumstances" to allow Pepper to be returned to prison, when he fully served the only sentence in this case imposed consistently with this Court's precedents.

In the alternative, the Court should direct that no sentence imposed on remand require Pepper to serve additional time in prison. Pepper has already served the equivalent of a 42-month sentence (including good time).[31] Pepper has served nearly the term that a proper application of the law of the case doctrine would require. Based on Judge Bennett's decision, the highest appropriate sentence under 18 U.S.C. §3553(a), given Pepper's original cooperation with the government, is 58 months. Chief Judge Reade then deducted another twelve months for additional cooperation. This results in an established sentence, under the law of the case, of a maximum term of 46 months' imprisonment. Given Pepper's remarkable rehabilitation, he has now served a term

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[31] Pepper has served roughly 1,112 days, or 37 months, imprisonment, and he is entitled to 54 days of good time credit for each year served, or a little more than 162 days of credit for his three years in prison. *See Barber*, 130 S. Ct. at 2502-03 (citing 18 U.S.C. §3624(b)). No credit has been denied him by the Bureau of Prisons, and he has accordingly served the equivalent of a 42-month sentence.

that is plainly "sufficient" to serve the purposes of sentencing.

Respectfully submitted,

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18 U.S.C. §3553(a)

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by

the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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18 U.S.C. §3553(c)

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the

extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

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18 U.S.C. §3661

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

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21 U.S.C. §850

Except as otherwise provided in this subchapter or section 242a(a) of Title 42, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence under this subchapter or subchapter II of this chapter.

RESPONDENT'S BRIEF

SUPREME COURT, U.S.
AUG 31 2010
OFFICE OF THE CLERK

No. 09-6822

In the Supreme Court of the United States

JASON PEPPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, at petitioner's resentencing on remand following the government's appeal, the district court was required, under the law-of-the-case doctrine, to apply the same percentage departure from the Guidelines range for substantial assistance that had been applied at a prior sentencing.

2. Whether post-sentencing rehabilitation is an impermissible basis under 18 U.S.C. 3553(a) for varying downward at resentencing from the advisory Guidelines range.

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In the Supreme Court of the United States

No. 09-6822

JASON PEPPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 570 F.3d 958. Prior opinions of the court of appeals (Pet. App. 19-22, 27-30, 31-34) are reported at 518 F.3d 949, 486 F.3d 408, and 412 F.3d 995.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2009. The petition for a writ of certiorari was filed on September 29, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory and Guidelines provisions are reprinted in an appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted of conspiring to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. 846. The district court initially sentenced petitioner to 24 months of imprisonment, to be followed by five years of supervised release, but that sentence was set aside on appeal. Pet. App. 31-34 (*Pepper I*). On remand, the district court resentenced petitioner to 24 months of imprisonment, to be followed by five years of supervised release, and the court of appeals again reversed. *Id.* at 27-30 (*Pepper II*). This Court vacated the court of appeals' judgment and remanded the case for further consideration in light of *Gall* v. *United States*, 552 U.S. 38 (2007). Pet. App. 23. On remand from this Court, the court of appeals again reversed the 24-month sentence imposed by the district court and remanded for resentencing, *id.* at 19-22 (*Pepper III*), and this Court denied review, 129 S. Ct. 138. The district court thereafter resentenced petitioner to 77 months of imprisonment, to be followed by 12 months of supervised release. Pet. App. 8-9. The court subsequently reduced the term of imprisonment to 65 months pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure. *Id.* at 13-14. The court of appeals affirmed that sentence. *Id.* at 1-6 (*Pepper IV*).

1. In 2003, law enforcement officers arrested petitioner for his participation in a methamphetamine trafficking operation. Sealed J.A. (S.J.A.) 9. He pleaded guilty to one count of conspiracy to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. 846. Pet. App. 32.

a. At petitioner's initial sentencing in March 2004, the district court determined, under 18 U.S.C. 3553(f), that petitioner was not subject to any statutory minimum sentence based on his criminal history, the nature of his offense, and his cooperation with governmental authorities. J.A. 28, 45. The court also determined that petitioner's sentencing range under the Sentencing Guidelines (Guidelines) was 97 to 121 months of imprisonment, based on a total offense level of 30 and a criminal history category of I. *Ibid.*

The government moved for a downward departure of 15% from that range pursuant to Guidelines § 5K1.1. Pet. App. 32. Section 5K1.1 provides that a court may depart from the Guidelines "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." *Ibid.* Section 5K1.1 states that in determining an "appropriate reduction," the court may consider several factors that "include, but are not limited to," "the significance and usefulness of the defendant's assistance"; "the truthfulness, completeness, and reliability" of the defendant's information; "the nature and extent of the defendant's assistance"; "any injury suffered, or any danger or risk of injury to the defendant or his family[,] resulting from his assistance"; and "the timeliness of the defendant's assistance." *Id.* § 5K1.1(a)(1)-(5).

During the government's investigation into petitioner's drug trafficking, petitioner provided information to investigators and a grand jury about two other individuals' involvement with illegal drugs and guns. J.A. 31-33. The government therefore moved for a downward departure based on petitioner's "substantial assistance" in its investigation. The government advised

the court that, based on the factors listed in Guidelines § 5K1.1(a)(1)-(5), a 15% reduction would be appropriate. J.A. 35, 45. The district court, however, granted a significantly greater departure from the Guidelines range and imposed a sentence of 24 months of imprisonment, to be followed by five years of supervised release. J.A. 45. The court arrived at that sentence after calling officials at the Bureau of Prisons to determine the minimum term of imprisonment that petitioner could serve and still qualify for the residential drug abuse program at the federal prison in Yankton, South Dakota. J.A. 38-44; see Pet. App. 32.

b. The government appealed, and on June 24, 2005, the court of appeals reversed. Pet. App. 31-34. The court of appeals held that "the extent of a downward departure made pursuant to § 5K1.1 can be based only on assistance-related considerations." *Id.* at 33. The court concluded that the district court had "considered a matter unrelated to [petitioner's] assistance, namely its desire to sentence [petitioner] to the shortest possible term of imprisonment that would allow him to participate in the intensive drug treatment program at the federal prison in Yankton." *Ibid.* The court could not find that the error was harmless, because "given the pedestrian nature of [petitioner's] assistance," it was "far from certain" that the district court "would have arrived at the same guidelines sentence had it considered only assistance-related elements." *Id.* at 34. Accordingly, the court of appeals remanded "for resentencing in accordance with [its] opinion and with the principles

set forth by the Supreme Court in [*United States* v. *Booker*, 543 U.S. 220 (2005)]." Pet. App. 34.[1]

2. a. In May 2006, after this Court's decision in *Booker* rendering the Guidelines advisory, the district court resentenced petitioner and again imposed a sentence of 24 months of imprisonment. The parties agreed that petitioner's recommended sentencing range under the Guidelines remained 97 to 121 months of imprisonment. 5/5/06 Tr. 2. Petitioner presented evidence about his rehabilitation since his initial sentencing, testifying that he had completed a drug treatment program while in prison and had maintained employment and enrolled in community college after his release. J.A. 102-112. Petitioner's father also testified that petitioner had made substantial progress, J.A. 116-121, and petitioner's probation officer expressed the view that a 24-month sentence would be reasonable in light of petitioner's substantial assistance and post-sentencing conduct, J.A. 126-131.

The district court first granted a 40% downward departure under Guidelines § 5K1.1 for petitioner's assistance. According to the court, although petitioner had offered "a pedestrian or average amount of substantial assistance," national statistics suggested that petitioner should receive "a 50 percent reduction." J.A. 141-142; J.A. 138-140. The court recognized, however, that under then-existing circuit precedent, a downward departure of 50% for substantial assistance was permissible only in extraordinary circumstances. J.A. 136-141, 146-148; see *United States* v. *Dalton*, 404 F.3d 1029, 1033-1034 (8th

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[1] On June 27, 2005, petitioner was released from custody after serving his 24-month sentence, less credit awarded for good conduct. Pet. App. 5; see 18 U.S.C. 3624(a). Petitioner began serving his five-year period of supervised release at that time.

Cir. 2005). The court therefore granted a downward departure of 40% "given how timely [petitioner] was and how truthful and honest he was" in assisting the government. J.A. 143. That departure reduced the bottom of the advisory Guidelines range from 97 to 58 months of imprisonment.

The court then granted a further 59% downward variance under 18 U.S.C. 3553(a) based on petitioner's rehabilitation since his initial sentencing; his lack of a violent history; and, to a lesser degree, the need to avoid unwarranted sentencing disparity with coconspirators in the case. J.A. 143-148; see Pet. App. 28-29. The court concluded that "it would [not] advance any purpose of federal sentencing policy or any other policy behind the federal sentencing guidelines to send this defendant back to prison." J.A. 149-150. The court's 59% variance from the 58-month bottom of the advisory Guidelines range resulted in a sentence of 24 months of imprisonment. J.A. 149.

b. The government again appealed petitioner's sentence, and the court of appeals again reversed. Pet. App. 27-30. The court of appeals stated that, although it was a "close call," the district court had not abused its discretion in granting a 40% downward departure for substantial assistance. *Id.* at 28. The court of appeals concluded, however, that the district court had abused its discretion in granting a further 59% downward variance under 18 U.S.C. 3553(a). Pet. App. 28-30. In reaching that conclusion, the court of appeals ruled that evidence of petitioner's post-sentencing rehabilitation was an "impermissible factor to consider in granting a

downward variance" under Section 3553(a). *Id.* at 30.[2] The court reasoned that evidence of post-sentencing rehabilitation could not have been considered at the original sentencing and thus permitting its consideration upon resentencing "would create unwarranted disparities and inject blatant inequities into the sentencing process." *Id.* at 29-30. The court therefore remanded for resentencing "consistent with [its] opinion." *Id.* at 30. Because the district judge who had sentenced petitioner in 2004 and 2006 had expressed a reluctance to sentence petitioner a third time if the case was again remanded, the court of appeals directed that the case be assigned to a different judge for resentencing. *Ibid.*

3. On January 7, 2008, this Court vacated the judgment in *Pepper II* and remanded the case to the court of appeals for further consideration in light of *Gall*. Pet. App. 23. On remand, the court of appeals concluded that *Gall* did not alter its holding that the district court had committed procedural error in failing to provide an adequate justification for a 59% downward variance under Section 3553(a). *Id.* at 19-22. As relevant here, the court of appeals concluded that *Gall* did not alter the rule that evidence of a defendant's post-sentencing rehabilitation "is an impermissible factor to consider in granting a downward variance." *Id.* at 21. The court further found that the district court had "given signifi-

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[2] The court of appeals found that the district court had erred with respect to the variance in two additional respects. First, the district court had considered petitioner's lack of a violent history, which had been accounted for in the court of appeals' view by petitioner's criminal history category and his eligibility for "safety-valve relief" under 18 U.S.C. 3553(f). Pet. App. 29. Second, the court of appeals found that the district court had considered unwarranted sentencing disparity among co-conspirators "without adequate foundation and explanation." *Id.* at 30.

cant weight, and possibly overwhelming weight," to that impermissible factor in imposing sentence. *Ibid.* Accordingly, the court of appeals reversed the 24-month sentence imposed by the district court and remanded the case for resentencing. *Id.* at 22. As it had done in its vacated decision in *Pepper II*, the court of appeals again directed that the resentencing be assigned to a different judge in the district court. *Ibid.* This Court denied a petition for a writ of certiorari. 129 S. Ct. 138.

4. a. Following *Pepper III*, petitioner was resentenced before a different district judge. The parties agreed that petitioner's recommended sentencing range under the Guidelines remained 97 to 121 months of imprisonment. J.A. 279; S.J.A. 27-28. The district court determined that, in departing from that range under Guidelines § 5K1.1 to account for petitioner's substantial assistance, it was not bound to grant petitioner the same 40% departure that had been applied by the judge who had sentenced him in 2006. Pet. App. 24-26; see S.J.A. 30. The district court reasoned that, in *Pepper II*, the court of appeals had "simply indicated that a 40% downward departure was not an abuse of discretion." Pet. App. 26. The court of appeals had not held "that a 40% downward departure is the only reasonable outcome" or "that the [district] court must impose a 40% downward departure on remand pursuant to USSG § 5K1.1." *Ibid.* Moreover, the district court noted that if the court of appeals "had wanted to narrow the scope of the remand in such a fashion, it would have so stated." *Ibid.* "Instead of affirming and reversing in part," the district court explained that the court of appeals "reversed and remanded" and "did not [give] any specific instructions to the court on the USSG § 5K1.1 issue." *Ibid.*

Exercising its discretion, the district court concluded that, based on "the applicable factors enumerated in USSG § 5K1.1, * * * [petitioner] is entitled to a 20% reduction in his advisory Sentencing Guidelines range." S.J.A. 33. In the court's view, petitioner provided "substantial assistance" that "was timely, helpful and important," but that "was in no way extraordinary." S.J.A. 32-33. In addition, the court based its conclusion solely on the record compiled at petitioner's initial sentencing. The district court stated that "[a]lthough four years have elapsed since the initial sentencing hearing and the parties indicate [petitioner] has provided further assistance, 'evidence of [petitioner's] post-sentencing rehabilitation is not relevant and will not be permitted at resentencing because the district court could not have considered that evidence at the time of the original sentencing.'" S.J.A. 32 (quoting *United States* v. *Jenners*, 473 F.3d 894, 899 (8th Cir. 2007)). As a result of the court's 20% downward departure, petitioner's advisory Guidelines range was 77 to 97 months of imprisonment. *Id.* at 33.

The district court then turned to petitioner's request for a downward variance based on his "exemplary behavior" since his release from prison. J.A. 221. After considering the sentencing factors set out in Section 3553(a), the district court found that no variance from the advisory Guidelines range was warranted. S.J.A. 33-49. The court agreed that petitioner had made "substantial positive changes in his life," S.J.A. 39, and it noted that since his release petitioner had "been employed, sober, enrolled in college, married and ha[d] taken on parental responsibilities," S.J.A. 37. The district court observed, however, that the court of appeals had ruled in *Pepper II* and *Pepper III* that post-

sentencing rehabilitation is not a permissible ground for a variance at resentencing. S.J.A. 39. The district court also declined to vary downward based on petitioner's personal characteristics and history, the sentencing disparity among coconspirators, or the costs of incarceration. S.J.A. 34-37, 40-49.

On January 5, 2009, the district court sentenced petitioner to 77 months of imprisonment, to be followed by 12 months of supervised release. Pet. App. 8-9. The court recommended that petitioner receive credit against his sentence for his previous completion of the Bureau of Prisons' residential drug abuse treatment program. *Id.* at 8. The court then granted the government's motion under Rule 35(b) of the Federal Rules of Criminal Procedure and reduced petitioner's term of imprisonment to 65 months to account for investigative assistance petitioner had provided after his initial sentencing. *Id.* at 13-14; see *id.* at 3.

b. The court of appeals affirmed petitioner's sentence. Pet. App. 1-6. As relevant here, the court rejected petitioner's claim that the scope of the prior remand and the law-of-the-case doctrine required the district court at the 2009 resentencing to grant petitioner the same 40% departure for substantial assistance that the district court had granted him at the 2006 initial sentencing. *Id.* at 3-4. The court of appeals noted that a sentencing court on remand is bound to proceed within the scope of any limitations imposed by the appellate court, but the court of appeals found that its decisions in *Pepper II* and *Pepper III* did not restrict the district court's discretion in determining the extent of any substantial assistance departure at resentencing. *Ibid.* The court of appeals concluded that it had ordered a "general remand for resentencing" that "did not place any

limitations on the discretion of the newly assigned district court judge in resentencing [petitioner]." *Id.* at 4. In reaching that conclusion, the court noted that its earlier decisions had not specified that the district court would be bound by the 40% downward departure for substantial assistance previously granted but had merely found that a 40% departure was "within the range of reasonableness." *Ibid.*

The court of appeals also rejected petitioner's argument that the district court had erred in refusing to consider his post-sentencing rehabilitation as a basis for a downward variance under Section 3553(a). Pet. App. 4-5. The court of appeals acknowledged that petitioner had "made significant progress during and following his initial period of imprisonment" by enrolling in community college, marrying and becoming a stepfather to his wife's daughter, and working as a night crew supervisor at Sam's Club. *Id.* at 5. The court of appeals commended petitioner on the "positive changes he has made in his life." *Ibid.* The court ruled, however, that petitioner's claim was foreclosed by circuit precedent holding that "post-sentencing rehabilitation is not a permissible factor to consider in granting a downward variance." *Ibid.* The court of appeals therefore affirmed petitioner's sentence in all respects.[4]

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[4] Petitioner was released from federal custody on June 27, 2005, after serving his original 24-month sentence. See n.1, *supra*. After the district court resentenced petitioner to 65 months of imprisonment, petitioner was returned to federal custody. On July 22, 2010, after this Court had granted the petition for a writ of certiorari, the district court granted petitioner's motion for release pending disposition of this appeal. 03-cr-4113 Docket entry No. 237.

SUMMARY OF ARGUMENT

I. The law-of-the case doctrine did not entitle petitioner to receive the same 40% downward departure for substantial assistance at his 2009 resentencing that he had received at his 2006 resentencing. The district court's decision to grant only a 20% departure was consistent with the law of the case, because the court of appeals had not held in its previous opinions (in *Pepper II* and *Pepper III*) that a 40% departure was necessary. Rather, the court of appeals had held simply that a 40% departure was not an abuse of the district court's discretion. That holding left the district court free to exercise its discretion differently at the 2009 resentencing. Moreover, following its general practice, the court of appeals remanded the case for a general resentencing, without limiting the scope of remand to particular issues. The district court therefore permissibly conducted a de novo assessment of the factors in Guidelines § 5K1.1, and its exercise of discretion in that regard did not violate any previous instruction from the court of appeals.

II. A. A defendant's rehabilitation after his original sentencing is a permissible basis for a downward variance from the applicable Guidelines range at resentencing. Courts have long considered a wide range of evidence concerning a defendant's personal history and characteristics in order to select an appropriate sentence. For the past 40 years, that principle has been codified in Section 3661, which provides that "[n]o limitation shall be placed on the information concerning the [defendant's] background, character, and conduct" that courts "may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. There is no basis in the text or purpose of Section 3661 for the

court of appeals' categorical prohibition against the consideration of post-sentencing rehabilitation.

Nor did the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, alter this aspect of sentencing courts' discretion. Congress specified seven factors that courts must consider in imposing sentence, see 18 U.S.C. 3553(a), but those factors indicate that courts have discretion to consider post-sentencing rehabilitation. Such rehabilitation is potentially relevant to a defendant's "history and characteristics," 18 U.S.C. 3553(a)(1), as well as to the "need for the sentence imposed" to serve the purposes of sentencing, 18 U.S.C. 3553(a)(2). In addition to its potential relevance to the particular statutory factors in Section 3553(a), evidence of a defendant's post-sentencing rehabilitation is relevant to a court's broad duty under that provision: "[to] impose a sentence sufficient, but not greater than necessary," to achieve the purposes of sentencing. 18 U.S.C. 3553(a).

Pursuant to Sections 3553(a) and 3661, this Court and the lower courts consistently have held that, subject to constitutional constraints, sentencing courts have discretion to consider any relevant information about a defendant's background, character, and conduct. Indeed, before 2000, every court of appeals to consider the question other than the Eighth Circuit had held that post-sentencing rehabilitation could provide an appropriate basis for a downward departure at resentencing. In 2000, the Sentencing Commission promulgated a policy statement providing that such rehabilitation could not provide the basis for a departure. See Guidelines § 5K2.19. But after this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), and its progeny, that policy statement is not binding, but rather is a fac-

tor to be considered by a sentencing court in determining an appropriate sentence.

B. The court of appeals erred in categorically prohibiting consideration of post-sentencing rehabilitation. The court relied primarily on "the need to avoid unwarranted sentencing disparities among defendants," 18 U.S.C. 3553(a)(6), but distinguishing between defendants whose sentences are reversed on appeal and other defendants is not necessarily "unwarranted." That distinction results from the fact that a defendant's sentence was imposed in legal error, not from some random or fortuitous circumstance. Moreover, the logic of the court of appeals' approach requires sentencing courts to ignore post-sentencing information more generally. For instance, courts could not consider evidence about a defendant's changed health or additional assistance to authorities; evidence of additional victims, harms, or offenses that were unknown at the time of sentencing; or even evidence that a defendant had committed post-sentencing offenses while released or in federal custody. All of those types of information can bear on the type and extent of the sentence that ought to be imposed at resentencing under Section 3553(a). In any event, the need to avoid sentencing disparities is only one of the factors in Section 3553(a), and district courts' task is to balance all of those factors in a given case. See, *e.g.*, *Kimbrough* v. *United States*, 552 U.S. 85, 90 (2007). The remaining possible rationales for the court of appeals' decision are equally unpersuasive.

III. The judgment of the court of appeals should be vacated. At petitioner's resentencing, the district court observed that petitioner had made substantial positive changes in his life since his original sentencing. The court further observed, however, that circuit precedent

foreclosed a downward variance based on petitioner's post-sentencing rehabilitation. The district court's erroneous refusal to consider post-sentencing rehabilitation as a possible basis for downward variance would not require vacatur of petitioner's sentence if the record established that the error was harmless. See Fed. R. Crim. P. 52(a); *Williams* v. *United States*, 503 U.S. 193, 203 (1992). The court of appeals did not address that issue, and, consistent with its normal practice, this Court should vacate the judgment of the court of appeals and remand the case to that court to consider the issue in the first instance. See *Neder* v. *United States*, 527 U.S. 1, 25 (1999).

ARGUMENT

Petitioner contends that the judgment below should be vacated for two reasons. The second of those reasons is correct. First, petitioner claims (Pet. 18-26) that the law-of-the-case doctrine and the court of appeals' 2008 remand order in *Pepper III* compelled the district court to grant him a 40% downward departure for substantial assistance at his 2009 resentencing. That claim is incorrect, because previous orders in this case did not require the district court to grant at resentencing the same substantial assistance departure that petitioner had been granted at his earlier sentencing.

Second, petitioner claims (Pet. 27-39) that the court of appeals erred in holding that, at his resentencing, the district court could not vary downward from the advisory Guidelines range under 18 U.S.C. 3553(a) based on petitioner's rehabilitation since his initial sentencing. That claim is correct, because post-sentencing rehabilitation is a permissible ground for a downward variance under Section 3553(a) at a general resentencing. See

U.S. Response Br. 11-15. The judgment of the court of appeals therefore should be vacated and the case should be remanded for further proceedings.

I. THE COURT OF APPEALS' DECISION IN *PEPPER III* DID NOT ENTITLE PETITIONER TO RECEIVE THE SAME 40% DEPARTURE FOR SUBSTANTIAL ASSISTANCE AT HIS 2009 RESENTENCING THAT HE HAD RECEIVED AT HIS 2006 RESENTENCING

Petitioner was initially sentenced in 2004, but it is his two resentencings in 2006 and 2009 that are at issue before this Court. At petitioner's first resentencing in May 2006, the district court granted a 40% downward departure under Guidelines § 5K1.1 for petitioner's substantial assistance during the government's investigation into drug trafficking. In *Pepper II*, the court of appeals reversed and remanded for resentencing, but this Court then vacated and remanded the case to the court of appeals for further consideration in light of *Gall* v. *United States*, 552 U.S. 38 (2007). In *Pepper III*, the court of appeals determined that *Gall* had not altered its earlier decision, and it again reversed and remanded for resentencing. At petitioner's second resentencing in January 2009, the district court granted only a 20% downward departure for substantial assistance. In *Pepper IV*, the court of appeals affirmed petitioner's sentence, including the 20% departure.

Petitioner incorrectly contends (Pet. 18-26) that, under the law-of-the-case doctrine, he was entitled to receive the same 40% downward departure at his 2009 resentencing that he had received at his 2006 resentencing. The district court's decision to grant only a 20% departure was consistent with the law of the case, because the court of appeals did not hold in *Pepper II* or

Pepper III that a 40% departure was necessary. Rather, the court of appeals held simply that a 40% departure was not an abuse of the district court's discretion, while leaving the district court free to exercise its discretion differently at the 2009 resentencing. The court of appeals then remanded the case for a general resentencing, without limiting the scope of remand to particular issues. The district court therefore permissibly conducted a de novo assessment of the factors in Guidelines § 5K1.1, and its exercise of discretion in that regard did not violate any instruction from the court of appeals in *Pepper III*.

A. The Law-Of-The-Case Doctrine Did Not Compel The Lower Courts To Grant A 40% Departure For Substantial Assistance

Petitioner claims (Pet. 19-21) that the law-of-the-case doctrine required the lower courts to grant a 40% departure for substantial assistance at his 2009 resentencing. Petitioner's reliance on that doctrine is misplaced. "As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona* v. *California*, 460 U.S. 605, 618 (1983); see *Yankton Sioux Tribe* v. *Podhradsky*, 606 F.3d 994, 1005 (8th Cir. 2010). The law of the case did not demand a 40% departure at petitioner's 2009 resentencing, because in *Pepper III* the court of appeals had decided as a "rule of law" only that a 40% departure was reasonable, not that it was required. Moreover, because *Pepper II*'s holding on the departure issue was vacated by this Court and never reinstated by the court of appeals, the law-of-the-case doctrine did not constrain

the district court's discretion to grant a different departure at resentencing.

1. During the first resentencing in 2006, the district court granted petitioner a 40% departure for his substantial assistance with the government's investigation. The government appealed the extent of that departure, and in *Pepper II* the court of appeals reviewed the departure under an abuse of discretion standard. Pet. App. 28 ("We review for abuse of discretion the extent of a reduction for substantial assistance."). The court of appeals reasoned that "there is no bright line percentage or mathematical formula to determine when the extent of a substantial assistance departure becomes unreasonable," but "some proportionality must exist between the defendant's assistance and the extent of the departure." *Ibid.* The court concluded that although the issue was "a close call," the court could not say that "the district court [had] abused its discretion by the extent of the § 5K1.1 departure." *Ibid.*

The court of appeals held in *Pepper II* only that a 40% departure was not an abuse of the district court's discretion under the Guidelines. The court did not hold that "a 40% downward departure [was] the only reasonable outcome" or that "the [district] court [had to] impose a 40% downward departure on remand." Pet. App. 26. Certainly by declaring that it was a "close call" whether the district court had abused its discretion, *id.* at 28, the court of appeals "suggested [that] a 40% departure was at the outer boundary of the range of reasonableness," *id.* at 4 n.2. See *id.* at 34 (referring to the "pedestrian" nature of petitioner's assistance). But the court of appeals did not limit the district court's discretion to grant some other departure within that "range of

reasonableness," and it implicitly indicated that a departure of less than 40% could fall within that range.

Petitioner himself concedes that *Pepper II* upheld the 40% departure under an abuse of discretion standard: "When the Eighth Circuit ruled that the original sentencing judge (Judge Bennett) did not abuse his discretion by the 40% 5K1.1 departure, this became the law of the case and should have been followed." Pet. 20. That concession is fatal to petitioner's law-of-the-case argument. As petitioner recognizes, the "rule of law" that resulted from *Pepper II* was that a 40% departure constituted a reasonable exercise of the district court's decision. *Arizona*, 460 U.S. at 618. But that holding did not constrain the district court's discretion to grant a different departure that was also reasonable. And when the district court granted a 20% departure, *Pepper IV* was entirely consistent with *Pepper II* in holding that a 20% departure also was within the range of reasonableness.

2. In any event, *Pepper II* is not the operative appellate decision. The court of appeals' decision in *Pepper II* was subsequently vacated and remanded by this Court. Pet. App. 23. Because *Pepper II*'s holding on the substantial assistance departure was vacated, that holding did not bind the district court at resentencing. See *County of L.A.* v. *Davis*, 440 U.S. 625, 634 n.6 (1979) ("Of necessity our decision 'vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect.'") (quoting *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 n.12 (1975)); see also *United States* v. *Atkinson*, 15 F.3d 715, 718-719 (7th Cir. 1994) (holding that because previous appeal resulted in vacatur of the defendant's sentence, the district court "[was not] bound

on remand to give the same U.S.S.G. § 5K1.1 downward departure that it gave in its original sentence").

The district court was bound by *Pepper III*, but that decision did not address the departure issue. Pet. App. 19-22. To be sure, when the court of appeals in *Pepper III* described the procedural history of the case, it noted its earlier finding that "the district court did not abuse its discretion by the extent of the § 5K1.1 downward departure." *Id.* at 20. But the court did not adopt or incorporate that portion of the vacated decision in *Pepper II*. Rather, the court proceeded to address the effect of *Gall* only on the district court's 59% downward variance—not the 40% downward departure. *Id.* at 19-22. After finding that the variance remained impermissible, the court of appeals concluded: "For the foregoing reasons, we again reverse and remand [petitioner's] case for resentencing consistent with this opinion." *Id.* at 22. That disposition did not require the district court to grant any particular departure at resentencing.[4]

Petitioner argues that *Pepper III* effectively ratified the 40% departure, because "*Pepper III* never ruled that Judge Bennett's findings regarding the 40% 5K1.1 downward departure were error as it had in *Pepper I*." Pet. 22. As a threshold matter, petitioner focuses on the wrong decision. *Pepper II* addressed the permissibility

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[4] In *Pepper III*, when the court of appeals instructed the district court to conduct the 2009 resentencing "consistent with this opinion," Pet. App. 22, that instruction did not mandate a 40% substantial assistance departure. After all, the *Pepper III* opinion had not addressed the departure's validity. To the contrary, it provided that "[t]he chief judge of the district court shall reassign this case, in the ordinary case, for resentencing by another judge," without any suggestion that the newly assigned judge would be limited in her authority to resentence petitioner. *Ibid.*

of the 40% departure, and that decision was vacated by this Court and never reinstated by the court of appeals. Setting aside that *Pepper III* said nothing about the departure's validity, petitioner's argument is cast at too high a level of generality: it ignores *why* the court of appeals found no error in the 40% departure. The court of appeals found no error in the departure because it represented a reasonable exercise of the district court's sentencing discretion. Pet. App. 28. The court of appeals did not say that a 40% downward departure was the only reasonable response to petitioner's assistance, and thus that any other departure would be in error.

B. The Court Of Appeals' Mandate In *Pepper III* Did Not Compel The District Court To Grant A 40% Departure For Substantial Assistance

Petitioner also claims (Pet. 19-21) that the court of appeals' mandate in *Pepper III* either expressly or implicitly compelled the district court to grant a 40% departure at resentencing. See Pet. 19 (asserting that a 20% departure "was inconsistent with either the express terms or the spirit of the remand of *Pepper III*"); Pet. 21 ("The mandate to the new sentencing judge from *Pepper III* was specifically limited to resentencing regarding appropriate variances under 18 U.S.C. § 3553(a) and *Gall*."); Pet. 22 (asserting that under "*Pepper III* * * * the only issue to be decided on remand was the variances under 18 U.S.C. § 3553(a) and *Gall*").[5] To the con-

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[5] The relevant question presented refers only to the law-of-the-case doctrine. See Pet. i. To the extent, however, that petitioner argues that "[t]he mandate to the new sentencing judge from *Pepper III* was specifically limited to resentencing regarding appropriate variances," Pet. 21, he appears to be invoking the so-called "mandate rule." See, *e.g.*, *United States* v. *Campbell*, 168 F.3d 263, 265 (6th Cir.) ("The basic tenet

trary, under the law of the Eighth Circuit, the reversal and remand in *Pepper III* was for a de novo resentencing. *Pepper III* did not place any limits on the district court's authority to determine the extent of petitioner's departure at resentencing.

1. A court of appeals has the authority to "modify, vacate, set aside or reverse any judgment * * * of a court lawfully brought before it for review." 28 U.S.C. 2106. When a court of appeals alters or overturns any portion of a lower court's judgment, it has the authority either to "remand the cause and direct the entry of [an] appropriate judgment" or to "require such further proceedings to be had as may be just under the circumstances." *Ibid.* In addition, in criminal cases when either the defendant or the government successfully appeals the sentence imposed by the district court, the court of appeals is required to "remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. 3742(f)(1); see 18 U.S.C. 3742(f)(2)(A) and (B). On remand, the district court is required to "resentence a defendant in accordance with [18 U.S.C.] 3553 and with such instruc-

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of the mandate rule is that the district court is bound to the scope of the remand issued by the court of appeals."), cert. denied, 528 U.S. 882 (1999); *United States* v. *Polland*, 56 F.3d 776, 777 (7th Cir. 1995) ("The mandate rule requires a lower court to adhere to the commands of a higher court."). The Court could view the question as to the scope of the mandate as "fairly included" within the question presented. Sup. Ct. R. 14.1(a); see *Volvo Trademark Holding Aktiebolaget* v. *Clark Mach. Co.*, 510 F.3d 474, 481 (4th Cir. 2007) ("The mandate rule is a specific application of the law of the case doctrine."); but cf. *Foskett* v. *Great Wolf Resorts, Inc.*, 340 Fed. Appx. 329, 331 (7th Cir. 2009) (per curiam) (contrasting the mandate rule with the law-of-the-case doctrine).

tions as may have been given by the court of appeals." 18 U.S.C. 3742(g).

Under those statutes, when a court of appeals determines that a defendant's sentence was imposed in error, the court has two options. It may issue a general remand that requires the district court to resentence the defendant de novo, or it may issue a limited remand that requires the district court to resentence the defendant only on particular issues. Pet. App. 3; see *United States* v. *Moore*, 131 F.3d 595, 597-598 (6th Cir. 1997) (discussing the difference between general and limited sentencing remands); *United States* v. *Polland*, 56 F.3d 776, 777 (7th Cir. 1995) ("[W]e have the power to limit a remand to specific issues or to order complete resentencing."). Whether the court of appeals orders a general or a limited resentencing, the district court must conduct resentencing according to the court of appeals' mandate, absent unusual circumstances. See, *e.g.*, *United States* v. *Campbell*, 168 F.3d 263, 265 (6th Cir.), cert. denied, 528 U.S. 882 (1999); *Polland*, 56 F.3d at 777.

2. In *Pepper II*, the court of appeals reversed and remanded for resentencing. This Court then vacated and remanded the case to the court of appeals for further consideration in light of its intervening decision in *Gall*. In *Pepper III*, the court of appeals determined that its earlier opinion was consistent with *Gall*, and it again reversed and remanded in the following terms:

> [W]e again reverse and remand [petitioner's] case for resentencing consistent with this opinion. As the district court expressed a reluctance to resentence [petitioner] again should the case be remanded, we again remand this case for resentencing by a differ-

ent judge, pursuant to our authority under 28 U.S.C. § 2106.

Pet. App. 22. The court of appeals did not specify whether its remand was general or limited in nature, but it also did not expressly limit the district court's authority on remand to resentence petitioner.

In that circumstance, several courts of appeals, including the Eighth Circuit, hold that the remand is general in nature: the sentencing court has authority on remand to resentence the defendant anew. See *United States* v. *Cornelius*, 968 F.2d 703, 705-706 (8th Cir. 1992); see also *United States* v. *Jennings*, 83 F.3d 145, 151 (6th Cir.), amended by 96 F.3d 799 (6th Cir.), cert. denied, 519 U.S. 975 (1996); *United States* v. *Ponce*, 51 F.3d 820, 826 (9th Cir. 1995); *United States* v. *Keifer*, 198 F.3d 798, 801 (10th Cir. 1999); *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) (per curiam), cert. denied, 519 U.S. 1137 (1997). Those courts presume that unless a remand is "limited to the resolution of specific issues," the remand permits resentencing de novo. *United States* v. *Walterman*, 408 F.3d 1084, 1085 (8th Cir. 2005); see *ibid.* (prior remand was limited because it "remand[ed] for resentencing without application of the career offender enhancement") (quoting *United States* v. *Walterman*, 343 F.3d 938, 943 (8th Cir. 2003)) (brackets in original).

By contrast, several other courts of appeals have adopted a default rule of limited resentencing. See *United States* v. *Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997) ("[U]pon a resentencing occasioned by a remand, unless the court of appeals expressly directs otherwise, the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the

result."), cert. denied, 522 U.S. 1119 (1998); *United States* v. *Ticchiarelli*, 171 F.3d 24, 32 (1st Cir.) (same), cert. denied, 528 U.S. 850 (1999); *United States* v. *Marmolejo*, 139 F.3d 528, 530-531 (5th Cir.) (same); *United States* v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996) (same), cert. denied, 522 U.S. 1119 (1998). And one court of appeals distinguishes "between conviction errors, for which de novo resentencing [is] the 'default rule,' and sentencing errors, for which limited resentencing [is] the default rule." *United States* v. *Rigas*, 583 F.3d 108, 115 (2d Cir. 2009) (emphases omitted), petition for cert. pending, No. 09-1456 (filed May 28, 2010); see *United States* v. *Quintieri*, 306 F.3d 1217, 1228 n.6 (2d Cir. 2002), cert. denied, 539 U.S. 902 (2003).

This case does not require the Court to decide among those approaches. In his petition, petitioner argues only that, under its own circuit precedent, the court of appeals incorrectly interpreted its previous mandate in *Pepper III*. See Pet. i; Pet. 18 ("The Eighth Circuit failed to require the district court to follow its own remand and the law of the case.") (capitalization and emphasis omitted). Similarly, before the court of appeals, petitioner argued only that the district court had incorrectly interpreted the mandate in *Pepper III*. Pet. C.A. Br. 20, 22-30. Petitioner has never argued that the court of appeals lacks the authority to establish a presumption governing the interpretation of its own mandates, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985); that the court of appeals' approach conflicts with any constitutional or statutory provisions, see *id.* at 148; or that there must be "uniformity among the circuits in their approach" to a mandate that remands for resentencing but does not expressly limit the district court's authority on remand to conduct the resentencing, see *Ortega-*

Rodriguez v. *United States*, 507 U.S. 234, 251 n.24 (1993). As a result, none of those issues was passed upon below. See, *e.g.*, *Hayes* v. *Florida*, 470 U.S. 811, 814-815 n.1 (1985) (declining to address an argument that "was not presented to or passed upon" by the lower courts). The only question here is whether the court of appeals correctly construed its own mandate under its own case law.

3. The answer to that question is yes. In *Pepper III*, the court of appeals remanded without limiting the resentencing to particular issues. Pet. App. 22. Under that court's longstanding case law, the district court therefore had authority on remand to resentence petitioner de novo. As the court of appeals explained in *Pepper IV*:

> Our remand was a general remand for resentencing. Our opinions in *Pepper II* and *Pepper III* did not place any limitations on the discretion of the newly assigned district court judge in resentencing [petitioner]. We did not specify the district court's discretion would be restricted to considering whether a downward variance was warranted, nor did we specify the district court would be bound by the 40% downward departure previously granted.

Id. at 4. Simply put, the court of appeals decided in *Pepper III* that "[u]nder the circumstances of [petitioner's] case, a complete resentencing without any restrictions on the district court's discretion was preferable, in contrast to a partial, piecemeal resentencing limiting the sentencing judge's discretion." *Ibid.*

It should not be surprising that the court of appeals correctly interpreted the mandate of its earlier decision. "[T]he court that issues a mandate is normally the best

judge of its content," even if that interpretation does not strictly bind this Court. *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940); see *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 227 (1947) ("We have recognized that 'the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes.'") (quoting *Pottsville Broad. Co.*, 309 U.S. at 141). Petitioner does not advance (Pet. 20-21) any reason why this Court is better placed than the court of appeals to interpret that court's mandate. On its face, the *Pepper III* mandate "reverse[d] and remanded" the case "for resentencing," without specifying that resentencing would be limited to the variance issue. Pet. App. 22.

Accordingly, the district court did not err in revisiting the extent of petitioner's departure for substantial assistance at his 2009 resentencing. The district court's decision to grant only a 20% departure reflected its de novo assessment of the factors in Guidelines § 5K1.1, following the court of appeals' general remand for resentencing. The district court's exercise of its discretion in that respect did not violate any previous order in this case, because, as the court of appeals itself explained, "[its] opinions in *Pepper II* and *Pepper III* did not place any limitations on the discretion of the newly assigned district court judge in resentencing [petitioner]." Pet. App. 4. By issuing a general remand and reassigning the case, the court of appeals left the district court free on remand to exercise its discretion on a clean slate. That is precisely what the district court did in granting a 20% downward departure, which was more than the government requested at the 2009 resentencing

but less than petitioner previously had received at the 2006 resentencing.

4. Petitioner notes (Pet. 25) that by relitigating the issue before a different district court judge, the government was able to secure a different result. That possibility exists whenever a court of appeals remands for a general resentencing, not solely when the court of appeals reassigns the case on remand to a different judge. It may be true that the original district court judge "would [not] have entertained any argument regarding the 5K1.1 departure being any less or more than what he had already determined." Pet. 25. But it was the original judge's "reluctance to resentence [petitioner] again should the case be remanded" that led the court of appeals to reassign the case. Pet. App. 22. Petitioner did not challenge that reassignment before the court of appeals or this Court, and in any event he was not entitled to be resentenced by the same judge who had conducted his earlier sentencings. See *Liteky* v. *United States*, 510 U.S. 540, 554 (1994) ("Federal appellate courts' ability to assign a case to a different judge on remand rests * * * [in part] on the appellate courts' statutory power to 'require such further proceedings to be had as may be just under the circumstances.'") (quoting 28 U.S.C. 2106).

Finally, petitioner contends that "[i]f the government was not happy with the *Pepper II* decision regarding the 40% departure, it could have challenged the reduction" before the court of appeals or this Court. Pet. 25. That argument rests on a faulty premise: namely, that the court of appeals either declared the 40% downward departure to be necessary or limited the scope of its remand only to the variance issue. Because the government was not precluded from litigating on remand the

extent of any substantial assistance departure, it had no reason to seek further review following *Pepper II* or *Pepper III*. If anything, petitioner should have challenged the court of appeals' decision to "reverse and remand [his] case for resentencing consistent with this opinion." Pet. App. 22. Nothing in that disposition limited the scope of the "resentencing by a different judge." *Ibid.* If petitioner felt otherwise, it was his responsibility—not the government's—to seek further review of *Pepper III* by the court of appeals or this Court.[6]

II. POST-SENTENCING REHABILITATION IS A PERMISSIBLE GROUND FOR A DOWNWARD VARIANCE UNDER 18 U.S.C. 3553(a) AT RESENTENCING

Under *United States* v. *Booker*, 543 U.S. 220 (2005), the mandatory application of the federal Sentencing Guidelines violates the Sixth Amendment. To remedy that constitutional defect, this Court severed the provisions of the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.*, that made the Guidelines mandatory,

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[6] If the Court were to decide that petitioner was entitled under *Pepper III* to receive a 40% departure at resentencing, then the Court should vacate and remand for further proceedings. As petitioner acknowledges (Pet. 19), the law-of-the-case doctrine is discretionary and does not necessarily foreclose reconsideration of a previously decided issue. *Arizona*, 460 U.S. at 618 ("Law of the case directs a court's discretion, it does not limit the tribunal's power."); 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4478, at 667-668 (2d ed. 2002). The court of appeals therefore should be given the opportunity to apply the law-of-the-case doctrine in the first instance and determine whether to reconsider its ruling in *Pepper III*. Similarly, if the court of appeals misinterpreted its own mandate, it would be free to determine whether to reconsider that mandate and permit a general resentencing. See, *e.g.*, *Indu Craft, Inc.* v. *Bank of Baroda*, 87 F.3d 614, 620 (2d Cir.) ("Even if we were to reconsider our earlier mandate, Indu Craft would fare no better."), cert. denied, 519 U.S. 1041 (1996).

and thereby rendered the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245. After *Booker*, district courts may impose sentences within statutory limits based on appropriate consideration of the factors listed in 18 U.S.C. 3553(a). 543 U.S. at 245-246; see *Kimbrough* v. *United States*, 552 U.S. 85, 90 (2007). A defendant's rehabilitation after his original sentencing may be relevant to the Section 3553(a) factors as a basis for a variance from the advisory Guidelines range. The court of appeals therefore erred in holding that post-sentencing rehabilitation is an impermissible basis for varying downward at resentencing.[7]

A. At Resentencing, The Court May Consider Information Concerning A Defendant's Character And Conduct, Including Evidence Of Post-Sentencing Rehabilitation

1. It has been a "uniform and constant" principle of the federal sentencing tradition that the sentencing court will "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon* v. *United States*, 518 U.S. 81, 113 (1996); see *Lockett* v. *Ohio*, 438 U.S. 586, 602 (1978) (opinion of Burger, C.J.) ("[T]he concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country."); *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires

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[7] Whether post-sentencing rehabilitation can provide an appropriate basis for a downward variance at a resentencing is a question of law that this Court reviews de novo. Cf. *Koon* v. *United States*, 518 U.S. 81, 100 (1996) ("[W]hether a factor is a permissible basis for departure under any circumstances is a question of law.").

* * * that there be taken into account * * * the character and propensities of the offender."); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.) ("The aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it."), cert. denied, 382 U.S. 843 (1965).

Consistent with that principle, sentencing courts have long enjoyed broad discretion to consider various kinds of information about a defendant's character and conduct. As this Court has described that historical practice,

> both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Williams v. *New York*, 337 U.S. 241, 246 (1949); see Note, *The Admissibility of Character Evidence In Determining Sentence*, 9 U. Chi. L. Rev. 715, 717 (1942) ("Under the common law system, * * * [t]he court, after the jury returned a verdict of guilty, heard additional character evidence before determining the sentence."); *id.* at 717 n.11 (collecting English cases).

In *Williams*, for instance, after a state court jury found the defendant guilty of murder but recommended life imprisonment, the trial judge imposed a death sentence in part on the basis of evidence in the presentence investigation report about the defendant's previous criminal conduct. 337 U.S. at 243-244. That conduct had not resulted in conviction and had not been before the jury, but this Court held that the judge's reliance on

such information at sentencing comported with principles of due process. *Id.* at 245. After surveying the historical practice of permitting courts to "exercise a wide discretion in the sources and types of evidence" to be considered in fixing an appropriate sentence, the Court noted the "sound practical reasons" for that historical practice. *Id.* at 246. It explained that a sentencing judge's "task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined." *Id.* at 247. "Highly relevant—if not essential—to his selection of an appropriate sentence," the Court reasoned, "is the possession of the fullest information possible concerning the defendant's life and characteristics." *Ibid.*

2. a. In 1970, Congress codified that "longstanding principle that sentencing courts have broad discretion to consider various kinds of information" in 18 U.S.C. 3577 (1970) (current version at 18 U.S.C. 3661). *United States* v. *Watts*, 519 U.S. 148, 151 (1997) (per curiam). Section 3577 provided that

> [n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. 3577 (1970). Subject to constitutional constraints, Section 3577 permitted a sentencing judge in determining the appropriate punishment to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); see *United States* v. *Baylin*, 535 F. Supp. 1145, 1151 (D. Del.) ("It is now well settled

that, subject to very few limitations, a court has almost unfettered discretion in determining what information it will hear and rely upon in sentencing deliberations."), vacated, 696 F.2d 1030 (3d Cir. 1982).

b. The advent of the Sentencing Guidelines with the SRA did not alter this aspect of a sentencing court's discretion. See *Watts*, 519 U.S. at 152 (1997). The SRA, in addition to establishing the Sentencing Commission (Commission) and the Guidelines system, renumbered Section 3577, without any change, as 18 U.S.C. 3661. Moreover, in promulgating the Guidelines, the Commission incorporated Section 3661:

> In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

Guidelines § 1B1.4. Accordingly, both before and after the Guidelines' enactment, Congress and the Commission intended "[n]o limitation" "on the information concerning the background, character, and conduct" of a defendant that a court could "receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661.

To be sure, the SRA sets forth general considerations that district courts must take into account in exercising their sentencing discretion. Specifically, Section 3553(a) directs courts, "in determining the particular sentence to be imposed," to consider seven factors: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) "the

need for the sentence imposed" to serve purposes of the criminal laws; (3) "the kinds of sentences available"; (4) "the kinds of sentence and the sentencing range" established by the Guidelines; (5) "any pertinent policy statement" issued by the Commission; (6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution to any victims of the offense." 18 U.S.C. 3553(a)(1)-(7).

Those statutory factors indicate that courts have discretion to consider a defendant's post-sentencing rehabilitation. A defendant's rehabilitation since his original sentencing, no less than his rehabilitation from the time of his offense to his original sentencing, is potentially relevant to his "history and characteristics." 18 U.S.C. 3553(a)(1). A defendant's rehabilitation is also potentially relevant to the "need for the sentence imposed" to serve the purposes of sentencing. 18 U.S.C. 3553(a)(2). For instance, a defendant's rehabilitation can affect whether a particular sentence is necessary "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational treatment * * * or other correctional treatment in the most effective manner." 18 U.S.C. 3553(a)(2)(B)-(D). See *Gall*, 552 U.S. at 59 ("Gall's self-motivated rehabilitation * * * lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts.") (citing 18 U.S.C. 3553(a)(2)(B) and (C)).

In addition to its potential relevance to the particular statutory factors in Section 3553(a), evidence of a defendant's post-sentencing rehabilitation is relevant to a

court's broad duty under 3553(a) "[to] impose a sentence sufficient, but not greater than necessary," to achieve the purposes of sentencing. 18 U.S.C. 3553(a). A defendant's rehabilitation, whether before or after his initial sentencing, potentially bears on the type and extent of the sentence that ought to be imposed upon him. See *Ashe*, 302 U.S. at 55 ("[A defendant's] past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him."); see also *Gall*, 552 U.S. at 49-50 (noting that a sentencing court must "consider all of the § 3553(a) factors" and "make an individualized assessment" of the appropriate sentence "based on the facts presented").[8]

3. This Court has held that, pursuant to Sections 3553(a) and 3661, a wide range of information about a defendant's character and conduct may be considered at

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[8] Just as Section 3553 requires sentencing courts to consider a broad number of factors in determining a particular sentence, Section 1B1.3 of the Guidelines requires those courts to consider a broad array of "[r]elevant [c]onduct" in determining the appropriate Guidelines range. See *Watts*, 519 U.S. at 152-153 ("Section 1B1.3, in turn, describes in sweeping language the conduct that a sentencing court may consider in determining the applicable guideline range."). Although Section 3553 and Section 1B1.3 require sentencing courts to consider certain factors and relevant conduct, they are intended to capture, not to displace, traditional sentencing considerations. See *Witte* v. *United States*, 515 U.S. 389, 402 (1995) ("[V]ery roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment.") (quoting *United States* v. *Wright*, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.)) (second set of brackets in original). Moreover, Section 3553 and Section 1B1.3 complement Section 3661 and Section 1B1.4: in selecting the appropriate Guidelines range and sentence, courts may consider "any information concerning the background, character and conduct of the defendant." Guidelines § 1B1.4.

sentencing. In *Watts*, for example, this Court rejected the argument that sentencing courts may not consider conduct underlying a charge of which the defendant has been acquitted. 519 U.S. at 149. The Court reasoned that "the broad language of § 3661" does not provide "any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing." *Id.* at 152. The Court further noted that "sentencing courts have traditionally and constitutionally 'considered a defendant's past criminal behavior, even if no conviction resulted from that behavior,'" and "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." *Ibid.* (quoting *Nichols* v. *United States*, 511 U.S. 738, 747 (1994)).

Similarly, the courts of appeals consistently have held that, subject to constitutional constraints, sentencing courts have discretion to consider any relevant information about a defendant's background, character, and conduct. See, *e.g.*, *United States* v. *Stewart*, 590 F.3d 93, 167 (2d Cir. 2009) (Walker, J., concurring in part and dissenting in part) ("We do not categorically proscribe any factor 'concerning the [defendant's] background, character, and conduct,' with the exception of invidious factors.") (quoting 18 U.S.C. 3661), cert. denied, 130 S. Ct. 1924 (2010); *United States* v. *Burns*, 577 F.3d 887, 904 (8th Cir. 2009) ("The district court has discretion to consider virtually unlimited information."); *United States* v. *Berry*, 553 F.3d 273, 279 (3d Cir. 2009) (en banc) ("Sentencing courts have historically been afforded wide latitude in considering a defendant's background at sentencing," and "Congress has codified this discretion at 18 U.S.C. § 3661."); *United States* v. *Gamma Tech Indus., Inc.*, 265 F.3d 917, 924 (9th Cir. 2001) ("[T]he district court has virtually unfettered dis-

cretion in allowing affected individuals to present sentencing information to the court.").

4. In light of the broad discretion afforded to sentencing courts to consider information about a defendant's background, the vast majority of the courts of appeals had held before 2000 that post-sentencing rehabilitation could provide an appropriate basis for a downward departure at a resentencing. See *United States* v. *Core*, 125 F.3d 74, 75 (2d Cir. 1997) ("We find nothing in the pertinent statutes or the Sentencing Guidelines that prevents a sentencing judge from considering post-conviction rehabilitation in prison as a basis for departure if resentencing becomes necessary."), cert. denied, 522 U.S. 1067 (1998); see also *United States* v. *Bradstreet*, 207 F.3d 76, 82 (1st Cir. 2000); *United States* v. *Rudolph*, 190 F.3d 720, 723 (6th Cir. 1999); *United States* v. *Whitaker*, 152 F.3d 1238, 1240 (10th Cir. 1998); *United States* v. *Green*, 152 F.3d 1202, 1207-1208 (9th Cir. 1998) (per curiam); *United States* v. *Rhodes*, 145 F.3d 1375, 1379 (D.C. Cir. 1998); *United States* v. *Sally*, 116 F.3d 76, 80 (3d Cir. 1997). Indeed, only the Eighth Circuit had held that post-sentencing rehabilitation could not provide an appropriate basis for a downward departure at a resentencing. See *United States* v. *Sims*, 174 F.3d 911, 912 (8th Cir. 1999).

Beginning November 1, 2000, however, the Guidelines contained a policy statement providing that "[p]ost-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense." Guidelines § 5K2.19; see Guidelines App. C, amend. 602 (Amend. 602) (effective Nov. 1, 2000) (adding § 5K2.19 to the Guidelines).

Before this Court's decision in *Booker*, sentencing courts were required to adhere to that policy statement, just as they were required to adhere to the Guidelines themselves. See *Williams* v. *United States*, 503 U.S. 193, 201 (1992). Accordingly, from November 2000 (when the Commission promulgated the policy statement) to January 2005 (when this Court issued *Booker*), post-sentencing rehabilitation was an impermissible ground for sentencing outside the applicable Guidelines range. See Guidelines Ch. 5, Pt. K.2.

This Court in *Booker*, however, held that the mandatory Guidelines system violated the Sixth Amendment, and it remedied that violation by severing certain provisions of the SRA and thus rendering the Guidelines "effectively advisory." 543 U.S. at 245. After *Booker*, although "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," "the district judge should then consider all of the § 3553(a) factors" to determine the appropriate sentence. *Gall*, 552 U.S. at 49-50. As the Court clarified in *Kimbrough*, the Guidelines are now just "one factor among several" that "courts must consider in determining an appropriate sentence." 552 U.S. at 90; see *id.* at 91 ("A district judge must include the Guidelines range in the array of factors warranting consideration."); *id.* at 101 ("[W]hile the statute still requires a court to give respectful consideration to the Guidelines, *Booker* permits the court to tailor the sentence in light of other statutory concerns as well.") (citations and internal quotation marks omitted).

Although sentencing courts must give "respectful consideration" to the applicable Guidelines ranges, they "may vary [from those ranges] based solely on policy considerations, including disagreements with the Guide-

lines." *Kimbrough*, 552 U.S. at 101 (citation omitted). The Court recently reaffirmed that holding in *Spears* v. *United States*, 129 S. Ct. 840 (2009) (per curiam), reiterating that district courts generally have authority to vary from the "Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." *Id.* at 843. As the Court made clear in *Kimbrough* and *Spears*, policy statements prohibiting courts from imposing non-Guidelines sentences based on specified factors are no longer binding, and courts generally may vary from Guidelines ranges, as long as they do so based on considerations that are permissible under Sections 3553(a) and 3661 and not otherwise prohibited by law. Accordingly, the Commission's policy statement prohibiting consideration of post-sentencing rehabilitation is not binding, but rather is a factor to be considered by a sentencing court in determining an appropriate sentence.

B. The Court Of Appeals Erred In Categorically Prohibiting Consideration Of Post-Sentencing Rehabilitation

The court of appeals erred in holding that post-sentencing rehabilitation is not a permissible factor to consider in granting a downward variance. Pet. App. 5. The rationales for its holding are inconsistent with *Booker*.[9]

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[9] At the time of its decision in *Pepper IV*, the law of the Eighth Circuit was clear that post-sentencing rehabilitation is not an appropriate basis for a downward variance at resentencing. See Pet. App. 5 (citing cases); Gov't C.A. Br. 18 (same). Petitioner argued that circuit precedent was inconsistent with *Gall*, and that evidence of post-sentencing rehabilitation should be considered as relevant to some of the factors in Section 3553(a). Pet. C.A. Br. 40-41, 44, 47-48; Pet. C.A. Reply Br. 4-5. But petitioner's argument was squarely foreclosed by

1. Under Eighth Circuit law, petitioner's resentencing was a plenary sentencing proceeding, and petitioner was therefore entitled, like any defendant at such a proceeding, to an "individualized assessment" of his background, character, and conduct in light of all of Section 3553(a)'s factors. *Gall*, 552 U.S. at 50. As explained earlier, when the court of appeals remanded to the district court in *Pepper III*, it ordered a "general remand for resentencing" that "did not place any limitations on the discretion of the newly assigned district court judge in resentencing petitioner." Pet. App. 4; see p. 26, *supra*. As a result, petitioner's resentencing was a plenary sentencing proceeding at which the district court considered anew whether to grant either a downward departure or a downward variance. Pet. App. 26.

Because petitioner's resentencing hearing was plenary, petitioner was entitled to the full benefit of *Booker*. Section 3742(g) of Title 18 instructs as relevant that "[a] district court to which a case is remanded * * * shall resentence a defendant in accordance with section 3553." 18 U.S.C. 3742(g). The district court therefore was required to consider Section 3553(a)'s factors, and nothing in Section 3553(a) suggests that consideration of those factors differs depending on whether the defendant is being sentenced initially or

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Pepper III, as the government noted in its brief. See Gov't C.A. Br. 19-20; Pet. App. 21 ("Gall does not alter our circuit precedent * * * that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance."). *Pepper III* was decided on remand from this Court without briefing from the parties. Moreover, petitioner did not seek rehearing en banc after the panel decision in *Pepper IV*. As a result, until the certiorari stage before this Court, the government had not addressed the combined effect of *Gall* and *Kimbrough* on Eighth Circuit precedent prohibiting consideration of post-sentencing rehabilitation.

following a remand for resentencing. To the contrary, this Court recently indicated that *Booker* applies at any plenary sentencing hearing. In *Dillon* v. *United States*, 130 S. Ct. 2683 (2010), the Court held that "sentence-modification proceedings" under 18 U.S.C. 3582(c)(2) "do not implicate the interests identified in *Booker*," and it distinguished a sentence-modification proceeding from "a sentencing or resentencing proceeding," including a "plenary resentencing proceeding." 130 S. Ct. at 2690, 2691, 2692. The import of *Dillon* is that information relevant to the Section 3553(a) factors may be considered at any plenary sentencing hearing, whether the defendant is being sentenced for the first time or resentenced following a remand.[10]

2. The court of appeals relied on "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6); see Pet. App. 29-30 ("The practice of allowing consideration of post-sentencing rehabilitation would create unwarranted sentencing disparities and inject blatant inequities into the

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[10] In *United States* v. *Bernardo Sanchez*, 569 F.3d 995 (9th Cir.), cert. denied, 130 S. Ct. 761 (2009), the court of appeals held that a district court did not err in declining to consider post-sentencing rehabilitation on a limited remand under *United States* v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc). *Bernardo Sanchez*, 569 F.3d at 999. That holding is fully consistent with the government's position here. In cases remanded under *Ameline*, the purpose of the remand is solely to determine whether the district court committed reversible plain error in a pre-*Booker* sentencing by failing to treat the Guidelines as advisory. *Id.* at 998. Under Ninth Circuit law, that inquiry depends only on whether the district court would have imposed a materially different sentence at the original sentencing if it had known that the Guidelines were advisory. *Ameline*, 409 F.3d at 1084-1085. Post-sentencing developments do not bear on that inquiry.

sentencing process."); *id.* at 5. The court reasoned that consideration of post-sentencing rehabilitation would create unfairness for the vast bulk of defendants who are not resentenced and thus have no opportunity to seek more lenient sentences based on such rehabilitation. *Ibid.*; see *United States* v. *McMannus*, 496 F.3d 846, 852 n.4 (8th Cir. 2007) ("[A]llowing this evidence [of post-sentencing rehabilitation] * * * would be grossly unfair to the vast majority of defendants who receive no sentencing-court review of any positive post-sentencing rehabilitative efforts.").

a. It is certainly true that a defendant who receives resentencing will have an opportunity to present evidence of rehabilitation to the sentencing court that many other defendants will not. That distinction, however, results not from some random or fortuitous circumstance, but because a defendant's sentence was imposed in legal error. See *Rhodes*, 145 F.3d at 1381 ("Any disparity that might result from allowing the district court to consider post-conviction rehabilitation * * * flows not from Rhodes being 'lucky enough' to be resentenced, or from some 'random' event, but rather from the reversal of his section 924(c) conviction.") (citation omitted). As the District of Columbia Circuit has explained, "[d]istinguishing between prisoners whose convictions are reversed on appeal and all other prisoners hardly seems 'unwarranted.'" *Ibid.*

Even before *Booker*, sentencing courts were permitted to depart from the applicable Guidelines range based on a defendant's *pre-sentencing* rehabilitation, *i.e.*, rehabilitation after commission of the offense but before sentencing. See, *e.g.*, *United States* v. *Brock*, 108 F.3d 31, 35 (4th Cir. 1997); see also Amend. 602, comment. (reason for amendment) ("[D]epartures based on extraordi-

nary post-offense rehabilitative efforts prior to sentencing * * * have been allowed by every circuit that has ruled on the matter."). Of course, consideration of pre-sentencing rehabilitation also can create differences in outcome: a defendant who is tried and sentenced quickly has less of an opportunity to demonstrate rehabilitation than a defendant who is sentenced after a longer interval. See *Rudolph*, 190 F.3d at 724 ("[O]ne defendant may have no chance to rehabilitate himself before sentencing (*e.g.*, his case might rapidly proceed to trial and sentence), whereas another defendant might face lengthy (yet constitutionally acceptable) pre-trial and pre-sentence delays that permit her to avail herself of many rehabilitative services before her sentencing.").

The differences in outcome that may result because some defendants are tried and sentenced more rapidly than others, or because some defendants are sentenced in error and must be resentenced, are not necessarily "unwarranted" within the meaning of Section 3553(a)(6). Congress generally intended courts to consider available personal information about the defendants who stand before them for sentencing. See *Rhodes*, 145 F.3d at 1381 ("We know of no reason why sentencing courts' broad mandate under sections 3553(a) and 3661 to sentence defendants as they stand before the court—whether after plea bargaining, trial, or appeal—should exclude consideration of post-conviction rehabilitation."); *Core*, 125 F.3d at 77 (At resentencing, district courts must consider defendants as they stand before the court "at that time.").

Moreover, the logic of the court of appeals' approach requires not only that sentencing courts categorically ignore information about a defendant's post-sentencing rehabilitation, but also that they categorically ignore

any new post-sentencing information. For instance, courts could not consider that, after sentencing, the defendant had provided additional assistance to authorities, see Guidelines § 5K1.1; had shown signs of diminished capacity that would not have been apparent at sentencing, *id.* § 5K2.13; or had encountered significant health issues requiring medical or psychological treatment, see *United States* v. *Statman*, 604 F.3d 529, 534-535 (8th Cir. 2010) (district court sufficiently considered defendants' serious physical illnesses at sentencing). Likewise, courts could not consider evidence of additional victims, harms, or offenses that were unknown at the time of sentencing. Courts could not even consider that a defendant had committed post-sentencing offenses, whether while released or while in federal custody. Consideration of any of those factors—all of which bear directly on the type and extent of the punishment that ought to be imposed at resentencing—does not necessarily result in an "unwarranted" disparity, because any difference in outcome results from the desire for greater accuracy at sentencing rather than from some random or fortuitous circumstance.

b. In any event, "the need to avoid unwarranted sentencing disparities" is only one of the factors in Section 3553(a). Even if consideration of a defendant's post-sentencing rehabilitation could be viewed as resulting in a disparity that is "unwarranted," the district court may balance that factor against the remaining Section 3553(a) factors in the context of a particular case. In *Kimbrough*, for example, this Court rejected the argument "that if district courts are free to deviate from the Guidelines based on disagreements with the crack/ powder [cocaine] ratio, unwarranted disparities * * * will ensue." 552 U.S. at 106-107. The Court reasoned that to

the extent such disparities might arise, "the proper solution is not to treat the crack/powder ratio as mandatory" but for "district courts to consider the need to avoid unwarranted disparities—along with other § 3553(a) factors—when imposing sentences." *Id.* at 108 (emphasis omitted).

Similarly here, the proper solution is not to foreclose district courts from considering post-sentencing rehabilitation altogether, but to allow them to weigh the risk of any disparity against the other Section 3553(a) factors in a given case. See *Kimbrough*, 552 U.S. at 108 ("To reach an appropriate sentence, these disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by the crack/powder ratio itself."). Here, the court of appeals replaced that case-by-case balancing process with a categorical rule: district courts may never consider post-sentencing rehabilitation because the need to avoid disparity among defendants always weighs more heavily than other Section 3553(a) factors. But neither Section 3553(a) nor Section 3661 "suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing." *Watts*, 519 U.S. at 152.

That is not to say that a district court is required to reduce a defendant's sentence based on even a strong showing of post-sentencing rehabilitation. A district court may find persuasive, for example, the Guidelines policy statement that post-sentencing rehabilitation does not justify a below-Guidelines sentence. See Guidelines § 5K2.19; see also *Kimbrough*, 552 U.S. at 101 (stating that courts are required to give "respectful consideration to the Guidelines"). The court also might find in a particular case that the defendant's rehabilitative efforts had been adequately addressed through an

award of good time credit. See pp. 49-51, *infra*. Alternatively, the court simply might be skeptical about the authenticity of a defendant's efforts at rehabilitation while the sentence is on appeal. For all of those reasons, it is likely that a district court would impose a downward variance based on a defendant's post-sentencing rehabilitation only in "an unusual case." *United States* v. *Lloyd*, 469 F.3d 319, 324 (3d Cir. 2006), cert. denied, 552 U.S. 822 (2007); see *Bradstreet*, 207 F.3d at 82 (holding that post-sentencing rehabilitation could be a ground for departure "in a sufficiently exceptional case"); *Rhodes*, 145 F.3d at 1383 (holding that a defendant's rehabilitation must exceed "to an exceptional degree the rehabilitative efforts of all defendants") (internal quotation marks and citation omitted). Those judgments, however, are largely the province of the district court, see *Gall*, 552 U.S. at 51-52, and the court of appeals erred in adopting a flat prohibition on consideration of a defendant's rehabilitation after initial sentencing.

3. The court of appeals held that a sentencing court may not consider at resentencing any evidence that the court "could not have considered * * * at the time of the original sentencing." Pet. App. 5 (quoting *id.* at 21). The conclusion that evidence that was not available at a defendant's initial sentencing is outside of the court's purview at resentencing finds some support in 18 U.S.C. 3742(g)(2). Section 3742(g)(2) was enacted in 2003 as part of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act), Pub. L. No. 108-21, § 401(e), 117 Stat. 671. Section 3742(g)(2) provides that at resentencing

> [t]he court shall not impose a sentence outside the applicable guidelines range except upon a ground that—
>
> (A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and
>
> (B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

18 U.S.C. 3742(g). The purpose of Section 3742(g) was to "prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory." H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 59 (2003); see *United States* v. *Jackson*, 346 F.3d 22, 26 n.4 (2d Cir. 2003), adhered to on reh'g, 362 F.3d 160 (2d Cir.), cert. denied, 541 U.S. 1044 (2004), reh'g granted, vacated, and remanded, 543 U.S. 1097 (2005).

On its face, Section 3742(g) forecloses a district court from granting a downward variance at resentencing based on a defendant's post-sentencing rehabilitation. It prohibits imposition of a "sentence outside the applicable guidelines range" except on a ground that was "specifically and affirmatively included in the written statement of reasons * * * in connection with the previous sentencing" and that was "held by the court of appeals, in remanding the case, to be a permissible ground of departure." 18 U.S.C. 3742(g)(2)(A)-(B). By definition, "the written statement of reasons" for a defendant's initial sentence will not include the defendant's subsequent efforts at rehabilitation, 18 U.S.C. 3742(g)(2)(A), and the court of appeals therefore will not pass on the permissibility of post-sentencing rehabilitation as a ground for reducing the defendant's sentence

below the applicable Guidelines range, see 18 U.S.C. 3742(g)(2)(B).

The court of appeals did not rely on Section 3742(g)(2), and the government is not aware of any post-*Booker* decision holding that Section 3742(g)(2) limits a district court's authority at resentencing to vary from the advisory Guidelines range based on the factors in Section 3553(a). By restricting the authority of district courts to vary from the applicable Guidelines range at resentencing, Section 3742(g)(2) is invalid after *Booker*. To remedy the constitutional defect in the mandatory Guidelines, this Court in *Booker* severed and excised 18 U.S.C. 3553(b), the provision that required courts to impose a sentence within the Guidelines range unless there were circumstances that justified a departure. 543 U.S. at 259-260. The Court also excised 18 U.S.C. 3742(e), which had served to reinforce mandatory guidelines by "set[ting] forth standards for review on appeal, including *de novo* review of departures from the applicable Guidelines range." 543 U.S. at 259. "With these two sections excised (and statutory cross-references to the two sections consequently invalidated)," the Court held that "the remainder of the Act satisfies" constitutional requirements. *Ibid.*

The Court did not mention Section 3742(g)(2) in *Booker*. See 543 U.S. at 258 (listing other sentencing provisions that remain "perfectly valid"). But its rationale applies equally to that provision. See *Dillon*, 130 S. Ct. at 2698 n.5 (Stevens, J., dissenting) (citing Section 3742(g)(2) as "one additional provision of the Sentencing Reform Act [that] should have been excised, but was

not, in order to accomplish the Court's remedy").[11] As an initial matter, Section 3742 provides that a "ground of departure" is "permissible" at resentencing only if it "is authorized under section 3553(b)." 18 U.S.C. 3742(g)(2)(B) and (j)(1)(B). Section 3742(g)(2) thus incorporates a cross-reference to Section 3553(b), one of the provisions that the Court excised in *Booker*.[12] Moreover, Section 3742(g)(2) is like the appellate review provisions that the Court excised, in that Section 3742(g)(2)'s goal—namely, "to make Guidelines sentencing even more mandatory than it had been" before the PROTECT Act was enacted—has "ceased to be relevant." *Booker*, 543 U.S. at 261.

4. Finally, the court of appeals relied on circuit precedent holding that consideration of post-sentencing rehabilitation at resentencing "may interfere with the Bureau of Prisons's statutory power to award good-time credits to prisoners." *Sims*, 174 F.3d at 913; see Pet. App. 5 (citing *United States* v. *Jenners*, 473 F.3d 894, 899 (8th Cir. 2007), which in turn cited *Sims*); see also *Rhodes*, 145 F.3d at 1384 (Silberman, J., dissenting). As a threshold matter, it is equally true that for a defendant who is held in federal custody pending trial and sentencing, both the Bureau of Prisons and the sentenc-

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[11] The continuing validity of Section 3742(g)(2) after *Booker* was not at issue in *Dillon*, and the majority in *Dillon* therefore had no occasion to address that question.

[12] Indeed, the Court's disposition of the cases before it in *Booker*—by remanding for resentencing under an advisory Guidelines system, see 543 U.S. at 267—would have violated Section 3742(g)(2), had that provision remained valid. See *Nelson* v. *United States*, 129 S. Ct. 890, 892 (2009) (per curiam) (holding that sentencing court erroneously presumed that applicable Guidelines range was reasonable and remanding for "further proceedings consistent with this opinion").

ing court consider his conduct during the time that he is incarcerated. As noted above, every court of appeals to consider the question, including the Eighth Circuit, has held that sentencing courts may consider evidence of a defendant's pre-sentencing rehabilitation. See pp. 42-43, *supra*; see also *United States* v. *Chapman*, 356 F.3d 843, 847-848 (8th Cir. 2004) (holding that "post-offense, pre-sentencing rehabilitation" can provide an appropriate basis for a downward departure at sentencing). None of those courts has suggested that sentencing courts' consideration of pre-sentencing rehabilitation interferes with the authority of the Bureau of Prisons to award good time credit for the period of time between the commission of the offense and sentencing.

In any event, although it is true that a defendant's post-sentencing conduct could result both in an award of good time credit and a reduction in his sentence at a resentencing, those two methods of decreasing the amount of time that the defendant can spend in prison are different in important respects. See *Rhodes*, 145 F.3d at 1380. First, good time credit does not affect the length of a prisoner's court-imposed sentence. Such credit is an "administrative reward for compliance with prison regulations," *Sash* v. *Zenk*, 428 F.3d 132, 134 (2d Cir. 2005) (Sotomayor, J.), cert. denied, 549 U.S. 920 (2006), and it does not vest until the date of a prisoner's release, see 18 U.S.C. 3624(b)(2). By contrast, a reduction in a prisoner's sentence recognizes that the prisoner's conduct since his initial sentencing warrants a less severe criminal punishment, and once imposed, the reduction generally is not revocable. See *Rhodes*, 145 F.3d at 1380 ("[D]epartures based on rehabilitation alter the very terms of imprisonment."). Second, although prisoners typically comply with statutory conditions and

thus receive available good time credit, *ibid.*, a reduction for post-sentencing rehabilitation lies in the discretion of the sentencing court. Depending on that court's view of the evidence of rehabilitation, it could decline to grant any reduction, just as it could find that in an exceptional case a defendant's rehabilitation has not been adequately addressed through an award of good time credit.

III. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE VACATED

At petitioner's 2009 resentencing, the district court considered petitioner's request for a downward variance based on his "exemplary behavior" since his release from prison. J.A. 221. After considering the sentencing factors set out in Section 3553(a), the district court found that no variance from the advisory Guidelines range was warranted. S.J.A. 33-49. The court agreed that petitioner had made "substantial positive changes in his life," S.J.A. 39, and it noted that in the three and a half years since his release petitioner had "been employed, sober, enrolled in college, married and ha[d] taken on parental responsibilities," S.J.A. 37. See Pet. App. 5 ("We agree [petitioner] made significant progress during and following his initial period of imprisonment."). The district court observed, however, that under binding circuit precedent, it lacked the authority to grant a downward variance based on petitioner's post-sentencing rehabilitation. S.J.A. 16.

Although the district court misunderstood the extent of its authority to grant a downward variance from the advisory Guidelines range, that error would not warrant vacatur of petitioner's sentence if the district court would have imposed the same sentence absent the error. See Fed. R. Crim. P. 52(a); *Williams* v. *United States*,

503 U.S. 193, 203 (1992) ("[O]nce the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed."). The court of appeals did not address whether the district court's refusal to consider post-sentencing rehabilitation as a possible basis for downward variance was harmless.[13] "Consistent with [its] normal practice," this Court should therefore "remand this case to the Court of Appeals for it to consider in the first instance whether the . . . error was harmless." *Neder* v. *United States*, 527 U.S. 1, 25 (1999).

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[13] In granting petitioner release pending appeal after this Court granted review, the district court recently stated that it would not have exercised its discretion to grant petitioner a downward variance based on post-sentencing rehabilitation. 7/22/10 Tr. 5-6, 10-11. If this Court finds error, the significance of the district court's statements can be addressed by the court of appeals on remand, in light of this Court's decision and the entire record, and with the benefit of briefing by the parties.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3553(a) provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorpo-

rated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

2. 18 U.S.C. 3661 provides:

Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

3. 18 U.S.C. 3742 provides in pertinent part:

Review of a sentence

* * * * *

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

* * * * *

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

4. U.S. Sentencing Guidelines § 1B1.3 provides:

Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

5. U.S. Sentencing Guidelines § 1B1.4 provides:

Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

6. U.S. Sentencing Guidelines § 1B1.5 provides:

Interpretation of References to Other Offense Guidelines

(a) A cross reference (an instruction to apply another offense guideline) refers to the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions).

(b) (1) An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions), except as provided in subdivision (2) below.

(2) An instruction to use a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline.

(c) If the offense level is determined by a reference to another guideline under subsection (a) or (b)(1) above, the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.

(d) A reference to another guideline under subsection (a) or (b)(1) above may direct that it be applied only if it results in the greater offense level. In such case, the greater offense level means the greater Chapter Two offense level, except as otherwise expressly provided.

7. U.S. Sentencing Guidelines § 5K1.1 provides:

Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

8. U.S. Sentencing Guidelines § 5K2.19 provides:

Post-Sentencing Rehabilitative Efforts (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. 3583(e)(1).)

RESPONDENT'S BRIEF

RESPONSE REQUESTED

Supreme Court, U.S.
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No. 09-6822

IN THE SUPREME COURT OF THE UNITED STATES

JASON PEPPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, at petitioner's resentencing following the government's appeal, the district court was required to apply the same percentage departure from the Guidelines range for substantial assistance that had been applied at petitioner's initial sentencing.

2. Whether post-sentencing rehabilitation is an impermissible basis for varying downward at resentencing from the advisory Guidelines range under 18 U.S.C. 3553(a).

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 570 F.3d 958. Prior relevant opinions of the court of appeals (Pet. App. 19-22, 27-30, and 31-34) are reported at 518 F.3d 949, 486 F.3d 408, and 412 F.3d 995.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2009. The petition for a writ of certiorari was filed on September 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted of conspiring to distribute methamphetamine, in violation of 21 U.S.C. 846. The district court initially sentenced petitioner to 24 months of imprisonment, to be followed by five years of supervised release, but that sentence was set aside on appeal. Pet. App. 31-34 (Pepper I). On remand, the district court resentenced petitioner to 24 months of imprisonment, to be followed by five years of supervised release, and the court of appeals again reversed. Pet. App. 27-30 (Pepper II). This Court vacated the court of appeals' judgment and remanded the case for further consideration in light of Gall v. United States, 552 U.S. 38 (2007). Pet. App. 23. On remand from this Court, the court of appeals again reversed the 24-month sentence imposed by the district court and remanded for resentencing, Pet. App. 19-22 (Pepper III), and this Court denied review, Pepper v. United States, 129 S. Ct. 138 (2008). The district court thereafter resentenced petitioner to 77 months of imprisonment, to be followed by 12 months of supervised release, but the court subsequently reduced the term of imprisonment to 65 months pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure. Pet. App. 8, 14. The court of appeals affirmed that sentence. Id. at 1-6 (Pepper IV).

1. In 2003, law enforcement officers arrested petitioner for his participation in a methamphetamine trafficking operation. He pleaded guilty to conspiring to distribute methamphetamine, in violation of 21 U.S.C. 846. At his initial sentencing in 2004, the district court determined that his sentencing range under the United States Sentencing Guidelines was 97 to 121 months of imprisonment. The government moved for a 15% downward departure from that range pursuant to Sentencing Guidelines § 5K1.1 based on petitioner's substantial assistance in the investigation. The district court granted a significantly greater departure from the Guidelines range and imposed a sentence of 24 months of imprisonment. The government appealed, and the court of appeals reversed, finding that the district court had erred by considering factors unrelated to petitioner's assistance to the investigation in determining the extent of the substantial assistance departure. Pet. App. 31-34 (Pepper I); see 09-1191 Gov't C.A. Br. 3-7.

2. In 2006, the district court resentenced petitioner after this Court's decision in United States v. Booker, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory, and again imposed a sentence of 24 months of imprisonment. The court granted a 40% downward departure under the Guidelines for substantial assistance. The court also granted a further 59% downward variance under 18 U.S.C. 3553(a) based on petitioner's post-sentencing rehabilitation (including his completing a drug

treatment program, enrolling in community college, and maintaining employment after release from serving his initial sentence), petitioner's lack of a violent history, and, to a lesser degree, the need to avoid unwarranted sentencing disparity among the defendants in the case. See Pet. App. 28.

3. The government again appealed petitioner's sentence, and the court of appeals again reversed. Pet. App. 27-30 (Pepper II). The court stated that, although it was a "close call," the district court had not abused its discretion in granting a 40% downward departure for substantial assistance. Id. at 28. The court of appeals concluded, however, that the district court had abused its discretion in granting a further 59% downward variance under 18 U.S.C. 3553(a). Pet. App. 28-30. In reaching that conclusion, the court of appeals ruled that petitioner's alleged post-sentencing rehabilitation was an "impermissible factor to consider in granting a downward variance" under Section 3553(a). Id. at 30. The court reasoned that evidence of post-sentencing rehabilitation could not have been considered at the original sentencing and thus permitting its consideration upon resentencing "would create unwarranted disparities and inject blatant inequities into the sentencing process." Ibid. Because the district judge who had sentenced petitioner in 2004 and 2006 had expressed a reluctance to sentence petitioner a third time if the case was again remanded, the court of appeals directed that the case be assigned to a different judge for resentencing. Ibid.

4. This Court vacated the court of appeals' decision in Pepper II and remanded the case for further consideration in light of Gall v. United States, 552 U.S. 38 (2007). Pet. App. 23. On remand, the court of appeals concluded that Gall did not alter its holding that the district court had committed procedural error in failing to provide an adequate justification for a 59% downward variance under Section 3553(a), after the substantial assistance departure. Pet. App. 19-22 (Pepper III). As relevant here, the court of appeals concluded that Gall did not alter the rule that evidence of a defendant's post-sentencing rehabilitation "is an impermissible factor to consider in granting a downward variance," and the court found that the district court had "given significant weight, and possibly overwhelming weight," to that impermissible factor in imposing sentence. Id. at 21-22. Accordingly, the court of appeals reversed the 24-month sentence imposed by the district court and remanded the case for resentencing. Id. at 22. As in its vacated decision in Pepper II, the court of appeals directed that the resentencing be assigned to a different judge in the district court. Ibid. This Court denied a petition for a writ of certiorari. Pepper v. United States, 129 S. Ct. 138 (2008).

5. Following Pepper III, petitioner was resentenced before a different district judge. The parties agreed that petitioner's recommended sentencing range under the Guidelines remained 97 to 121 months of imprisonment. 12/22/2008 Sealed Sent. Mem. 4-5. The district court concluded that, in departing from that range under

Guidelines § 5K1.1 to account for petitioner's substantial assistance, the court was not bound to grant petitioner the same 40% departure that had been applied by the judge who initially sentenced him. Id. at 7; see Pet. App. 24-26. The district court determined that petitioner should instead receive only a 20% substantial assistance departure, which reduced his Guidelines sentencing range to 77 to 97 months. 12/22/2008 Sealed Sent. Mem. 8-10. After considering the sentencing factors set out in Section 3553(a) and petitioner's arguments, the district court further found that no variance from that advisory Guidelines range was warranted. Id. at 10-26. In reaching that conclusion, the court observed that the court of appeals had ruled in Pepper II and Pepper III that post-sentence rehabilitation is not a permissible ground for a variance at resentencing, and the district court accordingly declined to vary downward on that basis. Id. at 16.

On January 5, 2009, the district court sentenced petitioner to 77 months of imprisonment, to be followed by 12 months of supervised release. Pet. App. 8-9. The court then granted the government's motion under Rule 35(b) of the Federal Rules of Criminal Procedure and reduced petitioner's term of imprisonment to 65 months to account for investigative assistance petitioner had provided after his initial sentencing. Id. at 14-15; see id. at 3.

6. The court of appeals affirmed petitioner's sentence. Pet. App. 1-6. As relevant here, the court rejected petitioner's claim that the scope of the prior remand and the law-of-the-case doctrine

required the district court at his 2009 resentencing to grant him the same 40% departure for substantial assistance that the district court had granted him at his 2006 sentencing. The court of appeals noted that a sentencing court on remand is bound to proceed within the scope of any limitations imposed by the appellate court, but the court of appeals found that its decisions in Pepper II and Pepper III did not restrict the district court's discretion in determining the extent of any substantial assistance departure at resentencing. Id. at 3-4. The court of appeals concluded that it had ordered a "general remand for resentencing" that "did not place any limitations on the discretion of the newly assigned district court judge in resentencing petitioner." Id. at 4. In reaching that conclusion, the court noted that its prior decisions had not specified that the district court would be bound by the 40% downward departure for substantial assistance previously granted but had merely found that a 40% departure was "within the range of reasonableness." Ibid.

The court of appeals also rejected petitioner's argument that the district court had erred in refusing to consider his post-sentencing rehabilitative efforts as a basis for a downward variance under Section 3553(a). Pet. App. 4-5. The court of appeals acknowledged that petitioner had "made significant progress during and following his initial period of imprisonment," and it commended him on the "positive changes he has made in his life." Id. at 5. The court ruled, however, that petitioner's claim was

foreclosed by circuit precedent holding that "post-sentencing rehabilitation is not a permissible factor to consider in granting a downward variance." Ibid.

DISCUSSION

Petitioner raises two claims: first, he contends (Pet. 18-26) that the district court was required, under the law-of-the-case doctrine and the court of appeals' prior remand, to grant him a 40% downward departure for substantial assistance under Sentencing Guidelines § 5K.1.1; and, second, he contends (Pet. 27-29) that the court of appeals erred in holding that a district court, when conducting a general resentencing, may not vary downward from the Guidelines range under 18 U.S.C. 3553(a) based on a defendant's rehabilitation after his initial sentencing. Petitioner's first claim lacks merit and, in any event, does not warrant this Court's review. On petitioner's second claim, however, the government agrees with petitioner that the court of appeals erred in holding that post-sentencing rehabilitation is not a permissible ground for a downward variance under Section 3553(a) at resentencing. Accordingly, the Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand the case for further consideration in light of the position expressed in this brief.

1. Petitioner first renews (Pet. 18-26) his argument that the district court was required by the law-of-the-case doctrine and the court of appeals' prior remand to grant him at resentencing the

same 40% substantial assistance departure that he had been granted at his initial sentencing. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review of the claim is not warranted.

First, petitioner's reliance on the law-of-the-case doctrine is mistaken. "As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." Arizona v. California, 460 U.S. 605, 618 (1983). In its earlier opinions in this case, the court of appeals did not decide as a "rule of law" that petitioner was entitled to a 40% substantial assistance departure. Rather, in Pepper II, it concluded only that the district court's decision to grant a 40% departure did not constitute an abuse of discretion. Pet. App. 28; see id. at 4. As the courts below recognized, the court of appeals did not hold that a 40% departure "was the only reasonable outcome for [petitioner]." Ibid. Moreover, the court of appeals' decision in Pepper II was subsequently vacated by this Court, see id. at 23, and the court of appeals did not address the substantial-assistance issue in Pepper III, see id. at 19-22. The vacated-and-never-reinstated holding on the substantial-assistance departure could not have bound the district court on resentencing. In any event, as petitioner himself acknowledges (see Pet. 19, 20), the law-of-the-case doctrine is discretionary and does not limit a court's

power to address an issue. See Arizona v. California, 460 U.S. at 618. The exercise of that discretion by the courts below in the specific circumstances of this case, particularly in the absence of any claim by petitioner of a conflict with any decision of another court of appeals, does not warrant this Court's review.

Petitioner's related argument that the district court exceeded the scope of the remand by reducing the extent of the substantial assistance departure is similarly unfounded. Because Pepper II held only that the 40% departure was not an abuse of discretion and did not hold that a 40% departure was required, see Pet. App. 28, the court of appeals correctly concluded that its order in Pepper II remanding "for resentencing consistent with this opinion," id. at 30, did not require the district court to grant a 40% departure. See id. at 3-4. Indeed, Pepper II did not even govern the district court's actions on resentencing because that decision was vacated by this Court. Id. at 23. Instead, the resentencing was governed by the instructions in Pepper III that petitioner be resentenced "consistent with this opinion," id. at 22, and the Pepper III opinion did not address the validity of the 40% substantial-assistance departure, see id. at 19-22. In any event, the court of appeals' assessment of the scope of its own remand order is a fact-bound issue that does not warrant review by this Court.

2. Petitioner next contends (Pet. 27-29) that the court of appeals erred in holding that post-sentencing rehabilitation is an

impermissible factor to consider at resentencing in granting a downward variance under Section 3553(a). The government agrees.

a. Before this Court's decision in United States v. Booker, 543 U.S. 220 (2005), the United States Sentencing Guidelines were mandatory, and a district court was required to sentence within the Guidelines range unless the court found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by" the Guidelines. 18 U.S.C. 3553(b). In addition, various Guidelines policy statements provided that specified circumstances were not permissible grounds for departure from the Guidelines range. See Guidelines Ch. 5, Pt. K.2. Adherence to those policy statements, like adherence to the Guidelines themselves, was mandatory. Williams v. United States, 503 U.S. 193, 201 (1992).

Beginning November 1, 2000, the Guidelines contained a policy statement providing that "[p]ost-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense." Guidelines § 5K2.19; see Guidelines App. C, amend. 602 (effective Nov. 1, 2000) (adding § 5K2.19 to the Guidelines). Accordingly, when the Guidelines were mandatory, a defendant's post-sentencing rehabilitation was an impermissible ground for sentencing outside the Guidelines range.

In Booker, however, the Court held that the mandatory Guidelines system violated the Sixth Amendment, and the Court remedied that violation by severing certain provisions of the Sentencing Reform Act of 1984 (SRA) and thus rendering the Guidelines "effectively advisory." Booker, 543 U.S. at 245. The Court explained that, under the new sentencing regime, the SRA still requires "a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a)." Id. at 245-246.

After Booker, although "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," "the district judge should then consider all of the § 3553(a) factors" to determine the appropriate sentence. Gall v. United States, 552 U.S. 38, 49-50 (2007). As the Court clarified in Kimbrough v. United States, 552 U.S. 85 (2007), the Guidelines are now "just one factor among several" that "courts must consider in determining an appropriate sentence." Id. at 90. In particular, "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." Id. at 570 (citation omitted). The Court recently reaffirmed that holding in Spears v. United States, 129 S. Ct. 840 (2009) (per curiam), reiterating that district courts generally have authority to vary from the "Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular

case." Id. at 843. Accordingly, policy statements prohibiting courts from imposing non-Guidelines sentences based on specified factors are no longer binding, and courts generally may vary from the Guidelines range based on any consideration that is permissible under Section 3553(a).

No provision in Section 3553(a) prohibits a court from considering at resentencing a defendant's efforts at rehabilitation undertaken after his initial sentencing. On the contrary, Section 3553(a) specifically instructs sentencing courts to consider "the history and characteristics of the defendant." 18 U.S.C. 3553(a)(1). That phrase encompasses a defendant's rehabilitative efforts, whether they occur before or after his original sentencing. Consideration of a defendant's rehabilitation after his original sentencing may also be relevant to "the need for the sentence imposed" on resentencing "to protect the public from further crimes of the defendant," another Section 3553(a) factor. 18 U.S.C. 3553(a)(2). Accordingly, the court of appeals erred in concluding that, under the advisory Guidelines regime, post-sentencing rehabilitation is never a permissible factor to consider in varying downward under Section 3553(a) from the advisory Guidelines range.

b. Plenary consideration of the issue by this Court is not warranted at this time. The only other court of appeals that has held that consideration of post-sentencing rehabilitation is never permissible under the advisory Guidelines system is the Eleventh

Circuit. See United States v. Lorenzo, 471 F.3d 1219, 1221 (2006). That decision, like the decision below, was issued without the benefit of the government's current views on the issue. The Eleventh Circuit's decision in Lorenzo also predates this Court's decisions in Kimbrough and Spears. Accordingly, the Eleventh Circuit may well reconsider its position on the issue when confronted with the question in a future case.[1]

c. Because the district court sentenced petitioner under the misapprehension that post-sentencing rehabilitation is an impermissible factor to consider in granting a downward variance under Section 3553(a), see 12/22/2008 Sent. Mem. 16, the court of appeals should have vacated petitioner's sentence and remanded for resentencing. Its failure to do so was based on its view that the district court was prohibited from considering petitioner's post-sentencing rehabilitation. Pet. App. 5-6. As explained above,

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[1] In United States v. Bernardo Sanchez, 569 F.3d 995, 999 (9th Cir.), cert. denied, 130 S. Ct. 761 (2009), the court of appeals held that a district court did not err in declining to consider post-sentencing rehabilitation on a limited remand under United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (en banc). That holding is fully consistent with the government's position here. Under Ameline, the sole issue is whether the district court committed reversible plain error in a pre-Booker sentencing by failing to treat the Guidelines as advisory, and the sole question is whether the district court would have imposed a materially different sentence had it known that the Guidelines were advisory. Id. at 1084-1085. Post-sentencing developments do not bear on that inquiry. In contrast, in this case, as the court of appeals expressly concluded, it had ordered a "general remand for resentencing" that "did not place any limitations on the discretion of the newly assigned district court judge in resentencing petitioner." Pet. App. 4.

that view is incorrect.[2] In arriving at that ruling, however, the court of appeals did not have the benefit of the government's current views on the issue. See Gov't C.A. Br. 16-20 (arguing that post-sentencing rehabilitation could not be considered). The court of appeals also did not discuss the impact of Kimbrough and Spears on its prior holdings that post-sentencing rehabilitation is an impermissible consideration. See Pet. App. 5-6. Accordingly, this Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further consideration by the courts below.

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[2] A district court may still decline to reduce a sentence for extraordinary post-sentencing rehabilitation. It may find persuasive, for example, the Sentencing Guidelines policy statement that post-sentencing rehabilitation does not justify a below-Guidelines sentence, see Guidelines § 5K2.19; it may conclude (as had the Commission) that good behavior in prison is to be rewarded by the Bureau of Prisons' award of good-conduct time that reduces a sentence by up to 54 days a year for "exemplary compliance with institutional disciplinary regulations," 18 U.S.C. 3624(b), see Guidelines § 5K2.19, comment.; the court might find it inequitable to reduce a sentence on grounds not available to prisoners who do not "gain the opportunity to be sentenced de novo," ibid.; or the court might take a skeptical view of rehabilitation undertaken only after sentencing. For those reasons, it is likely that a district court would impose a downward variance based on a defendant's post-sentencing rehabilitative efforts only in "an unusual case." United States v. Lloyd, 469 F.3d 319, 324 (3d Cir. 2006), cert. denied, 552 U.S. 822 (2007). But the reasons why such a reduction is likely to be rare do not mean that it is legally unavailable in an advisory Guidelines regime.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES**, via e-mail and first class mail, postage prepaid, this **February 19, 2010**.

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Elena Kagan
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Counsel of Record

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In the Supreme Court of the United States

No. 09-6822

JASON PEPPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

After the court of appeals set aside petitioner's sentence in its decision in *Pepper III*, it remanded for plenary resentencing. Petitioner and the amicus curiae appointed by this Court to support the judgment below contend that, at the 2009 resentencing, the district court's sentencing authority was limited. Petitioner claims that, under the law-of-the-case doctrine, the district court was required to grant the same percentage departure for substantial assistance that it had granted at petitioner's 2006 resentencing. Amicus claims that, under 18 U.S.C. 3742(g)(2), the district court lacked the authority to grant a downward variance on the basis of petitioner's post-sentencing rehabilitation. Neither claim is correct: petitioner's claim is inconsistent with the de novo nature of the 2009 resentencing proceeding, and amicus's claim is inconsistent with the advisory nature of the Guidelines after *United States* v. *Booker*, 543 U.S. 220 (2005).

I. THE LAW-OF-THE-CASE DOCTRINE DID NOT ENTITLE PETITIONER TO RECEIVE THE SAME 40% DEPARTURE FOR SUBSTANTIAL ASSISTANCE AT HIS 2009 RESENTENCING THAT HE HAD RECEIVED AT HIS 2006 RESENTENCING

At the certiorari stage, petitioner argued that the court of appeals' decisions in *Pepper II* and *III* required the district court to grant the same 40% departure for substantial assistance at his 2009 resentencing that it had granted at his 2006 resentencing. Pet. 18-26. The government therefore explained in its brief in opposition and its opening brief why neither the reasoning nor the mandate in *Pepper III*—which was the operative appellate decision—required the same percentage departure at petitioner's 2009 resentencing. See U.S. Br. 17-29. Petitioner responds by jettisoning both of his previous arguments and making yet a third argument: that the district court was bound under the law-of-the-case doctrine to its own earlier ruling at the 2006 resentencing. According to petitioner (Br. 50-59), that ruling was left undisturbed by *Pepper III* and the district court lacked compelling reasons to revisit it. But petitioner's new argument is incorrect for largely the same reasons that his old ones were. In *Pepper III*, the court of appeals set aside petitioner's sentence, remanded for a de novo resentencing, and directed that the case be reassigned to a different district court judge. The very point of *Pepper III* was for the district court to take a fresh look at an appropriate sentence, not to reinstate its earlier rulings—including the extent of any downward departure for substantial assistance—under the law-of-the-case doctrine.

1. At petitioner's first resentencing in May 2006, the district court granted a 40% downward departure under Guidelines § 5K1.1 for petitioner's substantial assistance during the government's investigation into drug trafficking.

In *Pepper II*, the court of appeals reversed and remanded for resentencing, but this Court then vacated and remanded the case to the court of appeals for further consideration in light of *Gall* v. *United States*, 552 U.S. 38 (2007). In *Pepper III*, the court of appeals determined that *Gall* had not altered its earlier decision; it again reversed and remanded for resentencing; and it directed that the resentencing be assigned to a different district court judge. On remand, the case was reassigned from Judge Bennett to Chief Judge Reade, who granted a 20% downward departure for substantial assistance at petitioner's second resentencing in January 2009.

Petitioner argues that when the court of appeals remanded the case in *Pepper III*, the court "did not disturb" Judge Bennett's determination that a 40% departure was appropriate. Br. 50. To the contrary, the court of appeals in *Pepper III* set aside petitioner's entire sentence. See Pet. App. 20 ("[W]e again reverse the sentence of the district court and remand for resentencing by a different judge."); *id.* at 22 ("For the foregoing reasons, we again reverse and remand [petitioner's] case for resentencing consistent with this opinion."). It is true that the court of appeals set aside petitioner's sentence because of perceived error in the district court's 59% downward variance, not its 40% downward departure. But that is irrelevant. What matters is that the court of appeals in *Pepper III* set aside petitioner's entire sentence, including the district court's 40% downward departure.

2. Because the court of appeals set aside petitioner's entire sentence, it remanded for a de novo resentencing consistent with that circuit's case law. See U.S. Br. 26-29. For those courts of appeals, including the Eighth Circuit, that have adopted a default rule of de novo resentencing, "[a] criminal sentence is a package of sanctions that the

district court utilizes to effectuate its sentencing intent." *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) (per curiam), cert. denied, 519 U.S. 1137 (1997). Under that "holistic approach," a vacated criminal sentence "becomes void in its entirety," having been "wholly nullified and the slate wiped clean." *Ibid.* (internal quotation marks and citation omitted). As a result, when a case is remanded for resentencing, "the district court is free to reconstruct the sentence utilizing any of the sentence components." *Ibid.* Accordingly, even assuming here that the district court's 40% downward departure "was, at the time, the law of the case, that sentence was wiped away" by *Pepper III*, and "the district court was free to consider" the extent of any downward departure at petitioner's resentencing. *Ibid.*

To be sure, the court of appeals could have chosen to limit petitioner's 2009 resentencing to particular issues rather than to remand for a de novo resentencing. But petitioner abandons any argument that the court of appeals' decision or mandate in *Pepper III* limited the district court to issues other than the substantial assistance departure. See Pet. Br. 58-59 & n.30 ("The question here is not whether Chief Judge Reade's decision violated the Eighth Circuit's remand order; it is whether it violated the law of the case doctrine, which under the circumstances required it to adhere to Judge Bennett's decision."). That concession is fatal to petitioner's law-of-the-case argument. By remanding for a de novo resentencing, the court of appeals wiped the slate clean.[1] The district court thus was writing

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[1] See, *e.g.*, *United States* v. *Young*, 66 F.3d 830, 838 (7th Cir. 1995) (noting that if the court of appeals' earlier decision "vacated the entire sentence and ordered de novo resentencing," then "the district court was under no obligation to give [the defendant] the same downward departure on resentencing as it had during the original sentencing hearing"); *United States* v. *Smith*, 930 F.2d 1450, 1456 (10th Cir.) (finding

on a blank slate at petitioner's 2009 resentencing, and it permissibly exercised its discretion in granting a lesser 20% downward departure.

II. POST-SENTENCING REHABILITATION IS A PERMISSIBLE GROUND FOR A DOWNWARD VARIANCE UNDER 18 U.S.C. 3553(a) AT RESENTENCING

Sentencing courts have historically had broad discretion to consider virtually any relevant information about a defendant's background and character. U.S. Br. 30-37. In 2000, the Sentencing Commission (Commission) promulgated a then-binding policy statement, Guidelines § 5K2.19, that for the first time limited the extent to which sentencing courts could consider a particular kind of relevant information about a defendant's background—namely, evidence of a defendant's post-sentencing rehabilitative efforts. That brief limitation, however, came to an end with this Court's decision in *Booker*. In *Booker* and subsequent cases, this Court held that a mandatory Guidelines system, including policy statements that would prevent courts from imposing non-Guidelines sentences based on specified factors, violated the Sixth Amendment. See, *e.g.*, *Spears* v. *United States*, 129 S. Ct. 840 (2009) (per curiam); *Kimbrough* v. *United States*, 552 U.S. 85, 100-101 (2007); *Booker*, 543 U.S. at 244-245.

In the wake of *Booker*, district courts may impose sentences within statutory limits based on appropriate consideration of the factors listed in 18 U.S.C. 3553(a). *Booker*,

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the law-of-the-case doctrine "inapposite" when a case is remanded for de novo resentencing), cert. denied, 502 U.S. 879 (1991); see also *United States* v. *Esperance*, 165 Fed. Appx. 814, 818 n.3 (11th Cir. 2006) ("When an appellate court vacates a sentence in its entirety and remands with a general mandate, the law-of-the-case doctrine does not apply, and the district court is free to conduct a *de novo* resentencing.").

543 U.S. at 245-246. A defendant's rehabilitation since his original sentencing is potentially relevant to two of those factors: the defendant's "history and characteristics," 18 U.S.C. 3553(a)(1); and the "need for the sentence imposed" to serve the purposes of sentencing, 18 U.S.C. 3553(a)(2). In addition to its potential relevance to the particular statutory factors in Section 3553(a), information about a defendant's post-sentencing rehabilitation is also relevant to a court's overarching duty under that provision "[to] impose a sentence sufficient, but not greater than necessary," to achieve the purposes of sentencing. 18 U.S.C. 3553(a). District courts therefore have had discretion since *Booker* to consider information about a defendant's post-sentencing rehabilitation.

Amicus does not directly respond to either of the government's main points: that courts have historically considered post-sentencing rehabilitation and that *Booker* overrides the Commission's relatively recent attempt to restrict such consideration. Rather, amicus argues that "permitting district courts to consider post-sentencing rehabilitation would defeat Congress' objectives under § 3553(a)." Br. 23 (emphasis omitted). Amicus's argument lacks merit.

1. Amicus first argues that consideration of post-sentencing rehabilitation would "[c]ontravene[] 18 U.S.C. § 3553(a)(5)." Br. 31 (emphasis omitted). That argument rests on a misunderstanding of what this Court did in *Booker*. After holding that the mandatory Guidelines system was contrary to the Sixth Amendment, the Court in *Booker* "determined that the appropriate cure was to sever and excise the provision * * * that rendered the Guidelines mandatory, 18 U.S.C. § 3553(b)(1)." *Kimbrough*, 552 U.S. at 100-101. The Court in *Booker* "also severed and excised the provision * * * requiring *de novo* review of departures from the Guidelines, 18 U.S.C. § 3742(e), be-

cause that provision depended on the Guidelines' mandatory status." *Id.* at 101 n.12. Those modifications of the sentencing statutes, this Court recognized in *Booker*, "make[] the Guidelines effectively advisory." 543 U.S. at 245.

It remains true that the Commission's policy statement, Guidelines § 5K2.19, is an authoritative guide to the meaning of the Guidelines themselves. See *Williams* v. *United States*, 503 U.S. 193, 201 (1992). Under Section 5K2.19, a district court may not depart downward from the applicable Guidelines range on the basis of post-sentencing rehabilitation. But that Guidelines range is itself advisory after *Booker*. The Guidelines—and the policy statements that illuminate their meaning—are now "one factor among several" that "courts must consider in determining an appropriate sentence." *Kimbrough*, 552 U.S. at 90. District courts must give "respectful consideration" to the Guidelines, accompanying policy statements, and commentary, *id.* at 101, but they may vary from the "Guidelines based on *policy* disagreement with them," *Spears*, 129 S. Ct. at 843.

The government thus agrees with amicus about "the enduring importance of the Guidelines" and "the need for district courts to consider the Commission's policy determinations." Amicus Br. 31. There are sound reasons for district courts to find the Commission's position persuasive and to decline to impose downward variances based on defendants' post-sentencing rehabilitation, or to grant such downward variances only in unusual or exceptional cases. See U.S. Br. 45-46. But when amicus says that "the Commission's policy statement * * * should be given effect," Amicus Br. 32, he does not mean that the policy statement should be paid respectful consideration by district courts as one factor in determining an appropriate sentence on a case-by-case basis. Rather, he means that it should be

mandatory, *i.e.*, that district courts should be categorically prohibited from considering post-sentencing rehabilitation in all cases. That position is simply irreconcilable with the advisory nature of the Guidelines system after *Booker*.

Amicus's position is also inconsistent with the Guidelines themselves. Section 5K2.19 does not prohibit consideration at resentencing of post-sentencing rehabilitation. Rather, Section 5K2.19 restricts the extent of such consideration, permitting consideration of post-sentencing rehabilitation in setting a sentence within the Guidelines range, but forbidding reliance on post-sentencing rehabilitation as a basis for departing from the Guidelines range. Section 5K2.19 thus does not reflect a judgment by the Commission as to the general appropriateness of considering post-sentencing rehabilitation; it instead reflects a determination by the Commission to limit the amount of weight given to post-sentencing rehabilitation. Under an advisory Guidelines system, however, the Commission's views about the weight to be given to a sentencing factor can no longer be given binding effect.

Nor would it matter if amicus were correct in asserting that Section 5K2.19's policy statement "lie[s] at the heart of the Commission's core function" or "arise[s] from its core mission." Amicus Br. 32. Amicus seems to suggest that some of the Commission's policy statements should be binding and others not, depending on whether the statement "exemplif[ies] the Commission's exercise of its characteristic institutional role." *Id.* at 33 (quoting *Kimbrough*, 552 U.S. at 108-109). But this Court has never indicated that the authority of district courts to vary from the "Guidelines based on policy disagreement with them" depends on the extent of the expertise that the Commission brought to bear in formulating the particular policy at issue. *Spears*, 129 S. Ct. at 843 (emphasis omitted). To the

contrary, this Court has held that district courts may vary from the Guidelines "based *solely* on policy considerations," *Kimbrough*, 552 U.S. at 101 (emphasis added), and among those considerations is the significance of a defendant's post-sentencing rehabilitation in arriving at an appropriate sentence.

2. Amicus also argues that consideration of post-sentencing rehabilitation would "create unwarranted disparities that [would] frustrate the purpose of 18 U.S.C. § 3553(a)(6)." Br. 25 (emphasis omitted). That argument is incorrect for two reasons. As an initial matter, the disparity that arises from treating defendants who were sentenced in error differently from defendants who were sentenced properly is not necessarily "unwarranted" within the meaning of Section 3553(a)(6). And even assuming that it were, that unwarranted disparity would be only one factor that a district court would have to balance against the other Section 3553(a) factors in determining an appropriate sentence.

a. Section 3553(a)(6) requires district courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." In Congress's view, "[s]entencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public." S. Rep. No. 225, 98th Cong., 1st Sess. 45 (1983) (*Senate Report*). Congress thus hoped to ensure that an offender would "not receive more favorable or less favorable treatment because he happens to be sentenced by a particular judge." *Id.* at 79; see *id.* at 41 ("The absence of a comprehensive Federal sentencing law * * * creates inevitable disparity in the sentences which courts impose on similarly situated defendants."); *id.* at 38 ("These disparities * * * can be traced directly to the

unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence.").

Consideration of post-sentencing rehabilitation may result in a disparity between the treatment of defendants who are sentenced properly and the treatment of defendants who must be resentenced. But that disparity results from "differences among * * * offenders," not from differences among the courts that sentence them. *Senate Report* 45. A defendant who must be resentenced may stand before the court with additional information that potentially bears on the determination of an appropriate sentence. Moreover, that information is likely to justify a downward variance only where the defendant's post-sentencing rehabilitative efforts have been exceptional as compared to those of other defendants. See, *e.g.*, *United States* v. *Bradstreet*, 207 F.3d 76, 82 (1st Cir. 2000). In those infrequent cases, it is specific information about the defendant's reformed character—and not the court's general sentencing predilections—that creates the disparate treatment, and thus the resulting disparity is not necessarily "unwarranted" within the meaning of Section 3553(a)(6).

Amicus is correct (Br. 27) that most defendants are sentenced properly, and thus few defendants will have the opportunity to present information about post-sentencing rehabilitation at resentencing. But that does not necessarily make any resulting disparity unfair. After all, some defendants will have a longer period of time between initial custody and trial, or between trial and sentencing, and those defendants thus will have a greater opportunity to demonstrate pre-sentencing rehabilitation. See, *e.g.*, *Uni-*

ted States v. *Rudolph*, 190 F.3d 720, 724 (6th Cir. 1999).[2] Amicus does not point to any evidence that Congress was concerned with the disparities in procedural opportunity that may result from the normal trial and sentencing process.[3]

Amicus also does not respond to the government's point that, under the logic of the court of appeals' approach, district courts would be categorically barred from considering any post-sentencing information. See U.S. Br. 44. Such a categorical bar finds no support in this Court's decisions. See *North Carolina* v. *Pearce*, 395 U.S. 711, 723 (1969) (holding that district courts may increase or decrease a defendant's sentence at resentencing "in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities'") (quoting *Williams* v. *New York*, 337 U.S. 241, 245 (1949)); cf. *Wasman* v. *United States*, 468 U.S. 559, 563 (1984). Nor has Congress or the Commission adopted any such categorical prohibition.

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[2] Amicus attempts to distinguish between pre-sentencing and post-sentencing rehabilitation, on the theory that "[e]very defendant has the right to a sentencing proceeding * * * [b]ut not every defendant obtains plenary resentencing." Br. 30. A plenary resentencing proceeding, however, functions like and implicates the same interests as an original sentencing proceeding. See U.S. Br. 41; *Dillon* v. *United States*, 130 S. Ct. 2683, 2690-2692 (2010). Under 18 U.S.C. 3553(a) and 3661, a defendant can present information relevant to his background and character at any plenary sentencing proceeding, whether the defendant is being sentenced for the first time or resentenced following a remand.

[3] Sentencing outcomes can be affected by many other fortuities of timing in the criminal process, including, for example, whether a defendant happens to be sentenced before or after the date of a new Guidelines provision that changes the sentencing range and is not made retroactive.

Indeed, even the court below has not been willing to accept the logical consequences of its reasoning, because it has permitted consideration of post-sentencing information that would tend to heighten the severity of the sentence imposed at resentencing. See *United States* v. *Stapleton*, 316 F.3d 754, 757 (8th Cir. 2003) (permitting "consideration of post-sentencing obstructive conduct that occurs in the judge's presence at resentencing"). There is no basis, however, for permitting information about post-sentencing events on only one side of the ledger. Under 18 U.S.C. 3553(a) and 3661, defendants may present post-sentencing information that potentially bears on the appropriate sentence, just as the government may present post-sentencing information about additional victims, harms, or offenses. Consideration of such information does not necessarily result in an "unwarranted" disparity within the meaning of Section 3553(a)(6).

b. Even if consideration of post-sentencing rehabilitation could properly be viewed as resulting in unwarranted sentence disparity, that is only one of the factors set forth in Section 3553(a). As this Court explained in *Kimbrough*, Section 3553(a) "provides that, in determining the appropriate sentence, the court should consider *a number of factors*," including the need to avoid unwarranted sentence disparities. 552 U.S. at 101 (emphasis added). Likewise, the courts of appeals to consider the question, including the Eighth Circuit, have uniformly recognized that "the need to avoid unwarranted sentence disparities" is only "one factor that must be considered by a district court after *Booker*." *United States* v. *Red Bird*, 450 F.3d 789, 795 (8th Cir. 2006); see, *e.g.*, *United States* v. *Martinez*, 610 F.3d 1216, 1228 (10th Cir. 2010), cert. denied, No. 10-6721 (Nov. 1, 2010). Here, the district court should be permitted on remand to balance any disparity created by consideration of

post-sentencing rehabilitation against the other Section 3553(a) factors.

3. Amicus further argues that "prohibiting consideration of post-sentencing rehabilitation is not inconsistent with § 3553(a)(1) or (a)(2)." Br. 33 (emphasis omitted). Section 3553(a)(1), which requires a sentencing court to consider "the history and characteristics of the defendant," is broad enough to encompass information indicating that a defendant has reformed himself since his original sentencing. See *Senate Report* 53 (directing district courts "to impose sentence after a *comprehensive examination* of the characteristics of the particular offense and the particular offender") (emphasis added). Amicus does not address Section 3553(a)(1) on its own terms, but instead bases his argument on 18 U.S.C. 3742(g). Br. 33-35. In amicus's view, Section 3742(g) places off limits at resentencing certain kinds of information—such as post-sentencing rehabilitation—that Section 3553(a) would otherwise allow district courts to consider. At the least, amicus argues, Section 3742(g) should inform this Court's interpretation of Section 3553(a). Br. 35. For reasons set forth below, however, Section 3742(g)(2) is invalid after *Booker* and thus does not bear on the interpretation of Section 3553(a)(1). See Part III, *infra*.

Amicus does address Section 3553(a)(2) on its own terms, but his assertion that post-sentencing rehabilitation is irrelevant to the purposes of resentencing cannot withstand scrutiny. Br. 37-38. As a matter of both statutory text and common sense, information that a defendant has rehabilitated himself since his original sentencing is relevant to whether a particular sentence is "sufficient, but not greater than necessary," "to afford adequate deterrence to criminal conduct" and "to protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(2)(B)-(C); see

Gall, 552 U.S. at 59; Amicus FPCD Br. 16-17. Although Congress has prohibited courts from imposing imprisonment solely so that a defendant could be rehabilitated in the future, 18 U.S.C. 3582(a), it has never suggested that a defendant should be sentenced or resentenced without respect to whether the defendant already has been rehabilitated or made substantial progress toward rehabilitation.

4. Finally, amicus argues that there are "other procedural mechanisms," such as good time credit or a sentence reduction under Federal Rule of Criminal Procedure 35(b), that "account for post-sentencing rehabilitation." Br. 38 (emphasis omitted). But neither of those mechanisms necessarily accounts for a defendant's rehabilitation between the time of an original sentencing and a subsequent resentencing. Once a defendant has been resentenced, then the Bureau of Prisons may award good time credit based on the defendant's compliance with institutional regulations, see 18 U.S.C. 3624(b), or the government may request a sentence reduction based on the defendant's substantial assistance to authorities, see Fed. R. Crim. P. 35(b)(1)-(2). Those inquiries, however, focus on the defendant's conduct *after* resentencing. Neither inquiry addresses the defendant's appropriate sentence *at* resentencing. To determine that, the sentencing court must consider a number of factors under Section 3553(a), and it may permissibly consider the degree of the defendant's rehabilitation at the time of resentencing.

III. BECAUSE IT RENDERS THE GUIDELINES SYSTEM MANDATORY AT RESENTENCING IN CERTAIN CASES, 18 U.S.C. 3742(g)(2) IS INVALID AFTER *BOOKER*

Amicus agrees (Br. 5) with the government that, at resentencing in any case remanded pursuant to 18 U.S.C. 3742(f), Section 3742(g)(2) prohibits a district court from

granting a downward variance on the basis of a defendant's post-sentencing rehabilitation. Section 3742(g)(2) accomplishes that result by requiring the district court at resentencing after remand to sentence within the applicable Guidelines range, subject to a narrow exception for any departure that was previously granted by the district court and expressly upheld by the court of appeals. The net effect of Section 3742(g)(2) is thus to make the Guidelines mandatory at resentencing in an entire set of cases. This Court's holding in *Booker*, however, establishes that Congress may not make the Guidelines mandatory in that way.

1. Amicus argues that this Court already upheld Section 3742(g)(2) in *Booker*. As amicus notes (Br. 12), the remedial opinion in *Booker* "severed and excised the provision of the statute requiring *de novo* review of departures from the Guidelines, 18 U.S.C. § 3742(e)." *Kimbrough*, 552 U.S. at 101 n.12. Amicus maintains that by excising Section 3742(e) but not Section 3742(g)(2), this Court indicated that the latter provision is consistent with an advisory Guidelines system. But examination of the briefs and opinions in *Booker* reveals that Section 3742(g)(2) was not brought to the Court's attention. Section 3742(g) was not cited in any of the parties' briefs or even in any of the numerous amicus briefs. It is therefore unsurprising that none of the opinions in *Booker* even mentions Section 3742(g)(2), much less expresses a view on whether that provision would remain valid under an advisory Guidelines system.

2. Amicus argues that Section 3742(g)(2) "withstands constitutional scrutiny because it does not impermissibly compel a district court on remand to impose a Guidelines sentence." Br. 7. The sentencing proceeding at issue in *Booker* illustrates why that argument is incorrect. The district court treated the Guidelines as mandatory and in-

creased Booker's sentence based on a drug-quantity finding made by the judge rather than the jury. 543 U.S. at 227. After this Court held in *Booker* that the Guidelines must be treated as advisory, the Court remanded the case. *Id.* at 267. Under Section 3742(g)(2), however, the resentencing judge in *Booker* still would have been required to treat the Guidelines as mandatory, because Section 3742(g)(2) permits a sentence outside the Guidelines range at resentencing only on a ground for departure relied upon at the original sentencing. Section 3742(g)(2) thus would fail constitutional scrutiny as applied to *Booker* itself, in addition to the many other cases in which resentencings were conducted in the wake of *Booker*.[4] The government made that point in its opening brief, see U.S. Br. 49 n.12, and amicus offers no response.

Section 3742(g)(2) would also have barred imposition of a non-Guidelines sentence on remand in *Nelson* v. *United States*, 129 S. Ct. 890 (2009), where this Court vacated a sentence and remanded because the district court had erroneously treated the Guidelines range as presumptively reasonable. The same would be true as to any sentencing in which a district court refuses to impose a non-Guidelines sentence based on a misunderstanding of its authority to depart under or vary from the Guidelines. Thus, if Section 3742(g)(2) were valid, there would be no remedy at resen-

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[4] Applying Section 3742(g)(2) at resentencing would not invariably be unlawful under the Sixth Amendment. That was equally true, however, of the sentencing provisions that this Court severed and excised in *Booker*. The Court in *Booker* rendered the Guidelines advisory rather than creating a system in which the Guidelines were mandatory some of the time and advisory some of the time. That same remedial approach requires severance and excision of Section 3742(g)(2). See *Dillon* v. *United States*, 130 S. Ct. 2683, 2698 n.5 (2010) (Stevens, J., dissenting).

tencing if a district court had initially imposed a Guidelines sentence based on an erroneous belief that it lacked the power to vary from the Guidelines' disparate treatment of crack and powder cocaine, but see *Kimbrough*, *supra*; or an erroneous belief that a non-Guidelines sentence must be supported by extraordinary circumstances, but see *Gall*, *supra*. In such cases, the sentencing judge will necessarily have failed to sentence outside the Guidelines, and Section 3742(g)(2) would therefore flatly preclude imposition of any non-Guidelines sentence on resentencing.

To take yet another example, consider a case in which the district court calculates a Guidelines range of 108 to 135 months, and concludes that a sentence of 108 months is appropriate in light of the factors specified in Section 3553(a). If the government successfully appealed on the ground that the court had erroneously refused to impose a four-level upward adjustment based on the defendant's role in the offense, the Guidelines range at resentencing would be 168 to 210 months (assuming no other change in the Guidelines calculations). If the district court at resentencing concluded that a downward variance to a sentence below 168 months was warranted, Section 3742(g)(2) would preclude the court from varying at all; it would require imposition of a within-Guidelines range sentence of at least 168 months. As these examples illustrate, Section 3742(g)(2) is an impermissible vestige of the mandatory Guidelines system.

3. Amicus claims that Section 3742(g) is designed to ensure "that a district court, on resentencing, may consider only information available to the court of appeals." Br. 7. To the contrary, Section 3742(g)(2) is designed to ensure something quite different: that once a departure is set aside on appeal, the district court cannot effectively impose the same sentence at resentencing on the basis of a differ-

ent departure. Section 3742(g)(2) accomplishes that result by doing what *Booker* forbids—namely, binding the district court to the applicable Guidelines range, along with any departure expressly approved by the court of appeals.

a. Section 3742(g)(2) does not prevent district courts from considering post-sentencing rehabilitation in a number of ways. As an initial matter, Section 3742(g) applies only to resentencings that are conducted after a sentence is overturned on appeal and the case is remanded. Section 3742(g) does not apply to resentencings that occur for other reasons, for instance, after a defendant's sentence is set aside on collateral review under 28 U.S.C. 2255 (Supp. II 2008). Amicus is therefore incorrect that Section 3742(g)(2) broadly aims at preventing district courts from considering post-sentencing developments.

Moreover, even at a resentencing after a remand, the district court may consider post-sentencing developments in setting the sentence within the applicable Guidelines range. Neither Section 3742(g)(2) nor the Guidelines preclude consideration of a defendant's post-sentencing rehabilitation for that purpose. Amicus's position thus amounts to saying that although a district court may consider post-sentencing rehabilitation when setting the sentence within an applicable Guidelines range, it may not consider that same information as a reason to set a sentence outside the applicable range. Leaving aside that amicus's position is no longer viable after *Booker*, Section 3742(g)(2) does not reflect a general congressional prohibition on consideration either of post-sentencing rehabilitation or more broadly of new facts at resentencing.

b. To the contrary, Section 3742(g)(2) has a quite different focus: constraining what Congress viewed as willful conduct by district court judges in the context of sentencing in sexual abuse and pornography cases. When it enacted

the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(e), 117 Stat. 671, Congress had before it evidence of "a growing trend of increasingly vague grounds of downward departure" in cases involving minor victims. *Hearing on H.R. 1104 Before the Subcomm. on Crime, Terrorism & Homeland Security of the H. Comm. on the Judiciary*, 108th Cong., 1st Sess. 18 (2003). Congress therefore wanted to ensure that district courts would grant downward departures in cases involving minor victims only on grounds specifically enumerated in the Guidelines. See H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 58-59 (2003). To that end, the PROTECT Act requires district courts "to give specific written reasons for any departure" from the Guidelines; implements a de novo standard of review "to allow appellate courts more effectively to review illegal and inappropriate downward departures"; and "prevent[s] sentencing courts, upon remand, from imposing the same illegal departure on a different theory." *Id.* at 59.

Section 3742(g)(2) thus had nothing to do with prohibiting consideration of post-sentencing developments, including a defendant's recent rehabilitation. Rather, Section 3742(g)(2) was meant to ensure that, under a then-mandatory Guidelines system, when a particular departure was reversed on appeal, the district court could not impose the same sentence on remand on the basis of a different departure. In other words, the purpose of Section 3742(g)(2) was to make the Guidelines even more mandatory: at resentencing, district courts could sentence outside the applicable Guidelines range only on the basis of a departure on which they had previously relied and which the court of appeals had previously upheld. Like the appellate review provisions that this Court excised in *Booker*,

Section 3742(g)(2) reflects a goal—"to make Guidelines sentencing even more mandatory than it ha[d] been" before the PROTECT Act—that has "ceased to be relevant." *Booker*, 543 U.S. at 261.[5]

The relevant point here is not simply that Section 3742(g)(2) restricts the authority of district courts to sentence outside the applicable Guidelines range. Amicus correctly notes (Br. 14-16) that appellate review imposes some constraints on district courts' sentencing authority. Rather, what matters is the manner in which Section 3742(g)(2) restricts the sentencing authority of district courts at resentencing, *i.e.*, by making the Guidelines mandatory, subject to a narrow exception for departures that have been previously granted by the district court and affirmed on appeal by the court of appeals. Because it in that respect renders the Guidelines mandatory at resentencing, Section 3742(g)(2) is inconsistent with *Booker*. 543 U.S. at 233, 259.

4. Finally, amicus contends (Br. 21-22) that any infirmity in Section 3742(g)(2) could be remedied by excising Section 3742(j)(1)(B) rather than Section 3742(g)(2). That

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[5] Amicus argues (Br. 19-20) that the term "departure" in Section 3742(g)(2) should be interpreted to include both departures under the Guidelines and variances under Section 3553(a). But at the time that Congress enacted Section 3742(g)(2), the Guidelines were mandatory and "departure" was a term of art that "refer[red] only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Irizarry* v. *United States*, 553 U.S. 708, 714 (2008). In any event, interpreting the term "departure" to include variances would mean only that the Guidelines would not be mandatory at resentencing in a small set of cases remanded under Sections 3742(f) and (g), *i.e.*, those cases in which a variance was granted by the district court at the original sentencing and affirmed by the court of appeals. In most cases remanded under Sections 3742(f) and (g), the Guidelines would remain mandatory, and thus amicus's implausible statutory interpretation does not resolve Section 3742(g)(2)'s fundamental defect.

would not, however, cure the infirmity. It is true that Section 3742(j)(1)(B) is problematic on its own terms, because it requires that for a "ground of departure" to be "permissible" at resentencing, that ground of departure must be "authorized under section 3553(b)." Section 3742(j)(1)(B) thus incorporates a cross-reference to Section 3553(b)(1), which is the statutory provision that rendered the Guidelines mandatory and that this Court excised in *Booker*.

But even if Section 3742(j)(1)(B) were excised and a district court could depart or vary on any ground at an original sentencing, the district court could not depart, let alone vary, on any new ground at resentencing so long as Section 3742(g)(2) remains in force. Rather, the district court would be limited to the applicable Guidelines range, along with any departure previously granted by the court and expressly upheld by the court of appeals. Because that has the effect of making the Guidelines mandatory at resentencing in an entire set of cases, amicus's proposed solution does nothing to fix the fundamental defect of Section 3742(g)(2). By contrast, excising Section 3742(g)(2) would fully address the problem, because it would render Section 3742(j)(1)(B)'s definitional provision effectively inoperative.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

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REPLY BRIEF

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JASON PEPPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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REPLY ARGUMENT

I. SECTION 3742(g)(2) CANNOT SUPPORT THE EIGHTH CIRCUIT'S BAN ON POST-SENTENCING REHABILITATION AS A GROUND FOR VARIANCE BECAUSE IT IS INVALID.

Amicus in Support of the Judgment Below ("Amicus") first urges this Court to uphold the Eighth Circuit's ban on consideration of post-sentencing rehabilitation on the basis of 18 U.S.C. §3742(g)(2), claiming (1) that this provision does not mandate Guidelines sentences in violation of *United States v. Booker*, 543 U.S. 220 (2005), Amicus Br. 2, 6-7, 10-11, 13, 18; (2) that it merely prevents the "same illegal departure on a different theory" on remand, *id.* at 11, 13-14; and (3) that several features of the "robust" standard of review for "departures" instituted by the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003), should now apply to "any sentence outside the guideline range" before such a sentence may be imposed on remand. *Id.* at 17-22. Amicus is entirely wrong.

A. Section 3742(g)(2) Is Invalid.

Booker itself invalidates §3742(g)(2) by providing that "statutory cross-references to the two sections" that it expressly invalidated, §3553(b) and §3742(e), were themselves "consequently invalidated." *Booker*, 543 U.S. at 259. Section 3742(g)(2)(B), together with

§3742(j)(1), constitutes such a cross-reference, providing that no sentence outside the guideline range may be imposed on remand except upon a ground "held by the court of appeals, in remanding the case," to be a "permissible ground of departure," defined in language that mirrors the excised standard of review for departures, including that the "departure" must be "authorized under section 3553(b)." *Compare* §3742(e)(3)(B) *with* §3742(j)(1). These cross-references were "consequently invalidated" by the holding in *Booker*.

Booker also invalidates §3742(g)(2) because subparagraph (A) of that provision prohibits any sentence outside the guideline range on remand except upon a ground previously stated by the district court. In many cases, this limitation would vitiate the remedy *Booker* provided – a remand for a sentencing in which the Guidelines are advisory only. *See Booker*, 543 U.S. at 267-68. Application of subparagraph (A) would have prevented obedience to this Court's mandate in *Booker* itself by making the Guidelines mandatory on remand. And in any succeeding case in which the district court erred by treating the Guidelines as mandatory, *see, e.g.*, *United States v. Conner*, 583 F.3d 1011, 1027 (7th Cir. 2009); *United States v. Santillanes*, 274 Fed. Appx. 718 (10th Cir. 2008), or presumptively applicable, *see, e.g.*, *Nelson v. United States*, 129 S. Ct. 890 (2009) (per curiam); *United States v. Mendoza-Mendoza*, 597 F.3d 212 (4th Cir. 2010), the same perverse result would obtain. In such cases, §3742(g)(2)(A) would mandate a Guidelines

sentence on remand, in direct contradiction of the relief granted on appeal, since the district court, having previously given no reason for a sentence outside the guideline range, would be precluded from exercising the discretion the appellate court's mandate requires. Indeed, the language of §3742(g)(2) demands this mandate-defeating result; its introductory clause expressly provides that on remand a sentencing court shall proceed "in accordance with . . . such instructions as may have been given by the court of appeals, *except that. . . .*" (emphasis added). The obligation to sentence within the Guidelines on remand is thus made explicitly superior to the district court's duty to obey the mandate. Avoidance of the question thus raised under Article III and the separation of powers is another powerful reason to recognize that §3742(g)(2) was invalidated by *Booker*.

In many other types of cases, the *Booker* remedy would be entirely unavailable if §3742(g)(2) were valid. Defendants whose cases were remanded on procedural grounds, such as the judge's failure to consider grounds asserted for variance, would be deprived of the opportunity, at any stage, to have arguments for a non-guideline sentence heard and acted on. In cases like *United States v. Sevilla*, 541 F.3d 226 (3d Cir. 2008), where the court of appeals reversed a Guideline sentence because the district court failed to consider the defendant's arguments for downward variance, §3742(g)(2)(A) would make the Guidelines mandatory on remand and deprive the defendant of any opportunity to have his argument

for a variance heard, as the very remand of the court of appeals and the holding of *Booker* required. *See also, e.g.*, *United States v. Dury*, 336 Fed. Appx. 371, 373 (4th Cir. 2009); *United States v. Tisdale*, 264 Fed. Appx. 403, 409-10 (5th Cir. 2008). When sentences are reversed for procedural error of this kind, the district courts, on further consideration, often impose a non-guideline sentence on remand,[1] but this proper result of the correction of a procedural error would not be possible under §3742(g)(2)(A). Another absurd result of §3742(g)(2)(A) would be that, in cases where the district court imposed a non-guideline sentence, but neglected to specifically state the reasons for it, *see, e.g.*, *United States v. Pena-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008), a sentence *within* the range would be required on remand.

Such a problem would also arise where the district court, after considering arguments for a non-guideline sentence and treating the Guidelines as advisory, imposes a Guideline sentence, *see Rita v. United States*, 551 U.S. 338, 351, 355 (2007), but that sentence is reversed because the guideline calculation was incorrect. In such cases, the district court may find it necessary on remand to vary from the corrected guideline range to reach the sentence that it finds, in its discretion, to comply with §3553(a). *See, e.g.*,

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[1] *See* Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation* 12-18 (2010), available at http://www.fd.org/pdf_lib/Procedure_Substance.pdf.

United States v. McClellan, 320 Fed. Appx. 162 (4th Cir. 2009) (reversing guideline sentence of 36 months because range was calculated incorrectly and should have been 121-151 months); Amended Judgment, *United States v. McClellan*, No. 1:04-cr-00074 (W.D.N.C. July 28, 2009) (correcting calculation and sentencing to 72 months under §3553(a)). Under §3742(g)(2)(A), the parties would be unable to argue for, or the court to impose, a non-guideline sentence, though the court never considered whether a sentence within the corrected guideline range was appropriate under §3553(a).

Not only would application of §3742(g)(2)(A) in these situations violate the *Booker* remedy, but it would often result in a Sixth Amendment violation by mandating on remand a sentence based on judge-found facts above the "statutory maximum" authorized by the facts found by the jury beyond a reasonable doubt or admitted by the defendant, *see Booker*, 543 U.S. at 244; *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), as it would have in Booker's and Fanfan's cases, *Booker*, 543 U.S. at 226-29, and in many subsequent cases.[2]

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[2] For example, the Sixth Amendment would have been violated in several of the cases cited *supra* at 2-5, because the guideline range, made mandatory by §3742(g)(2)(A) on remand, was based on judge-found facts. *See Tisdale*, 264 Fed. Appx. at 410-12; *Dury*, 336 Fed. Appx. at 372; *Pena-Hermosillo*, 522 F.3d at 1110; *McClellan*, 320 Fed. Appx. at 163; Def.'s Sent'g Mem.,

(Continued on following page)

Given the obvious invalidity and absurd results dictated by §3742(g)(2), it is not surprising that the lower courts after *Booker* have either ignored it,[3] or found it to be inapplicable.[4] Amicus cites two cases to suggest otherwise, Amicus Br. 9, 12, but both cases demonstrate that on remand, the Guidelines must be advisory to comply with *Booker*. In *United States v. Williams*, 411 F.3d 675 (6th Cir. 2005), where the

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United States v. Conner, 3:07-cr-00031 (W.D. Wis. Jan. 4, 2010); Def's Sent'g Mem. on Remand, *United States v. Santillanes*, No. CR 07-619 (D.N.M. June 16, 2008).

[3] *See, e.g.*, *United States v. McMannus*, 262 Fed. Appx. 732, 733 (8th Cir. 2008) (affirming downward variance on ground not included in initial statement of reasons, *United States v. McMannus*, 436 F.3d 871, 875 (8th Cir. 2006)); *United States v. Hernandez*, 604 F.3d 48 (2d Cir. 2010) (court may consider post-sentencing rehabilitation); *United States v. Bell*, 280 Fed. Appx. 548 (7th Cir. 2008) (affirming consideration of post-sentencing malingering to undermine competency determination); *United States v. Jones*, 489 F.3d 243 (6th Cir. 2007) (court may consider post-sentencing rehabilitation); *United States v. Reinhart*, 442 F.3d 857 (5th Cir. 2006) (affirming consideration of post-sentencing misconduct while incarcerated).

[4] *See United States v. Harrison*, 362 Fed. Appx. 958, 965 (11th Cir. 2010) (§3742(g)(2) did not preclude upward variance because "*Booker* made the guidelines range advisory and authorized 'variances' outside the range based on the §3553(a) factors"); *United States v. Angle*, 598 F.3d 352, 360 (7th Cir. 2010) (while §3742(g)(1) "precluded the district court from *applying*" the current, higher version of the Guidelines, "the statute did not bar the court from *consulting*" those Guidelines in the "exercise of *Booker* discretion" to impose upward variance on remand); *United States v. Bruce*, 256 Fed. Appx. 520 (3d Cir. 2007) (applying §3742(g)(2) would amount to "holding that the guidelines are mandatory on remand"; *dicta*).

judge had given no reason for a sentence outside the guideline range, the court of appeals held that the "most appropriate post-*Booker* understanding" of §3742(g) was to treat "the Guideline range . . . on resentencing as an advisory range." *Id.* at 678. In *United States v. Mills*, 491 F.3d 738 (8th Cir. 2007), §3742(g)(2) was applied to preclude a "departure" not included in the initial statement of reasons, but not to preclude a potential variance. On the government's appeal, the Eighth Circuit reversed based on §3742(g)(2), which it said "limits permissible departures on remand," and the ground for departure "does not appear in the district court's statement of reasons." *Id.* at 742-43. The court of appeals, however, remanded "for re-sentencing with consideration of the §3553(a) factors." *Id.* Accordingly, on remand, the district court imposed a downward variance under §3553(a),[5] and the government did not appeal.

B. Amicus's Proposed Revision Of §3742(g)(2)(B) And (j) Does Not Address §3742(g)(2)'s Invalidity And Is Itself Invalid.

Conceding that §3742(g)(2)(B) and (j)(1)(B) would forbid any sentence outside the guideline range on remand except a "departure" "authorized under section 3553(b)," thus rendering the Guidelines

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[5] *See* Amended Judgment, *United States v. Mills*, 5:02-cr-04089-MWB (N.D. Iowa Mar. 31, 2008).

mandatory, Amicus proposes to "construe" the word "departure" in §3742(g)(2)(B) to mean "any sentence outside the applicable Guidelines range" and to delete the cross-reference to §3553(b) from §3742(j)(1). Amicus Br. 19-22 & n.7. Under this revision, §3742(g)(2)(B) and (j) would prohibit "any sentence outside the applicable Guidelines range" unless "held by the court of appeals, in remanding the case," to "advance[] the objectives set forth in section 3553(a)(2)" and to be "justified by the facts of the case."

Even if the judicial power included the authority to rewrite an unconstitutional section of a statute (which it plainly does not, *see Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Hill v. Wallace*, 259 U.S. 44, 70-71 (1922); *United States v. Reese*, 92 U.S. 214, 221 (1876)), rather than merely sever and excise it, as this Court severed and excised §3742(e) in *Booker*, Amicus's revision itself is invalid. *First*, it fails to address the fact that subparagraph (A) of §3742(g)(2) alone would deprive defendants in many cases of any sentencing in which the Guidelines are advisory. As the cases cited in Part I.A, *supra*, demonstrate, the very error that occasions a remand often consists of, or has as a practical result, the failure to consider or state any basis for a sentence outside the guideline range, a failure that would mandate a Guidelines sentence under §3742(g)(2)(A).

Second, as Amicus puts it, under his revision, §3742(j)(1)(C) would "demand[] a non-Guidelines sentence be 'justified by the facts of the case.'" Amicus

Br. 22 n.7. But this Court has made clear that to ensure that the Guidelines are not "effectively mandatory," *Kimbrough v. United States*, 552 U.S. 85, 92 (2007), district courts must be able to sentence outside the guideline range when they find that the guideline range *itself* is unsound in light of the goals of §3553(a), *apart* from case-specific facts. *See Rita*, 551 U.S. at 351, 353, 357; *Kimbrough*, 552 U.S. at 101; *Spears v. United States*, 129 S. Ct. 840, 842 (2009); *cf. Cunningham v. California*, 549 U.S. 270, 278-81 (2007).

Third, Amicus's revision, like the plain text, would prohibit re-imposition of a variance or departure on remand that was imposed and included in the statement of reasons but was not the subject of an appellate holding in remanding the case. *See* 18 U.S.C. §3742(g)(2)(B) (ground must be "held by the court of appeals, in remanding the case, to be a permissible ground . . ."). In many cases, the judge imposes a sentence outside the guideline range but the sentence is appealed solely on some other basis, usually the calculation of the guideline range, in which case the court of appeals does not "hold" anything with respect to the variance or departure.

Fourth, when a sentence outside the guideline range *is* the subject of an appeal, Amicus's revision would compel, or invite, the courts of appeals to "hold" that the "ground" does or does not "advance[ ] the objectives set forth in section 3553(a)(2)," and is or is not "justified by the facts of the case." In other words, instead of reviewing all sentences "limited to

[deferentially] determining whether they are 'reasonable,'" *Gall v. United States*, 552 U.S. 38, 46 (2007), the courts of appeals would review sentences within the range deferentially for reasonableness (and in several circuits with a presumption of reasonableness), but would review "any sentence outside the guideline range" under a portion of the *de novo* standard of review excised in *Booker*, *compare* §3742(j)(1)(A), (C) *with* §3742(e)(3)(B)(i), (iii) – the very same standard rejected by this Court in *Gall* as *de facto de novo* review. *See* 552 U.S. at 56-60.

Nonetheless, Amicus argues that "any sentence outside the applicable Guidelines range" *should* be subject to this *de novo* standard of review because (1) the difference between departures and variances is merely "hypertechnical," Amicus Br. 19-20; (2) Congress's "intent [in the PROTECT Act] to effectuate meaningful appellate review of sentences is clearly applicable to both departures and variances," *id.* at 20; and (3) "now that district courts have broad sentencing discretion," there is an "enduring – if not enhanced – need" for "robust" review of all sentences outside the guideline range, *id.* at 17, 19 n.6. Thus, according to Amicus, any sentence outside the guideline range should be subject to the standard of review instituted by the PROTECT Act for "departures," minus only the reference to §3553(b). *Id.* at 21-22.

Amicus is quite wrong. The distinction between "departures" and variances is at the very heart of the difference between mandatory and advisory Guidelines, *see Gall*, 552 U.S. at 49-50; *Rita*, 551 U.S. at

351, 357; *Booker*, 543 U.S. at 261; if that were not the case, the excision of §3553(b) would have been pointless. *See Booker*, 543 U.S. at 234 ("availability of departures in specified circumstances does not avoid the constitutional issue"); *see also Irizarry v. United States*, 553 U.S. 708, 714-15 (2008) (declining to read term "departure" in Rule 32(h) to mean "variances . . . under the sentencing factors set forth in 18 U.S.C. §3553(a)").[6] And *all* sentences must be reviewed deferentially for unreasonableness, *see Gall*, 552 U.S. at 46; *Rita*, 551 U.S. at 351; *Booker*, 543 U.S. at 260-62; if that were not the case, the excision of §3742(e) would have been pointless. *See Booker*, 543 U.S. at 261 ("*de novo* standard of review for departures and . . . cross-reference to §3553(b)(1) . . . ma[de] Guidelines sentencing even more mandatory than it had been").

Congressional preferences expressed in the PROTECT Act cannot prevail. The reasons for §3742(g)(2), no less than §3742(e), "have ceased to be relevant."[7] *Booker*, 543 U.S. at 261.

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[6] Judges rarely impose "departures," U.S. Sent'g Comm'n, *Preliminary Quarterly Data Report, Third Quarter 2010*, tbl. 1 ("departures" imposed in 1.76% of non-government sponsored sentences below guideline range), because the "departure" provisions of the Guidelines Manual are inadequate and restrictive. U.S. Sent'g Comm'n, *Results of Survey of United States District Judges: January 2010 through March 2010*, tbl. 14 (2010).

[7] Unlike §3742(g)(2), §3742(f)(2) is not necessarily incapable of functioning independently of excised §3742(e). *Cf. Booker*,

(Continued on following page)

C. Section 3742(g)(2) Does Not Serve, And Cannot Be Made To Serve, Its Claimed Purpose.

Amicus claims that §3742(g)(2) is needed to "prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory." Amicus Br. 11, 16 (internal citation and quotation marks omitted). Amicus, however, has not shown what his argument suggests – that on remand, district courts engage in the subterfuge of adopting a "different theory," also invalid under §3553(a), to persist in imposing a legally erroneous sentence. While Amicus misleadingly describes this case in an effort to illustrate the point, Amicus Br. 16, what this case demonstrates is that, if applied, §3742(g)(2) would prevent district courts from resentencing based on *new* facts (*i.e.*, post-sentencing rehabilitation) and old facts (*i.e.*, lack of violent criminal history and

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543 U.S. at 307 n.6 (Scalia, J., dissenting). Unlike subsection (g)(2), subsection (f)(2) does not confine district courts to "departures" or require *de novo* review of sentences outside the guideline range. Subsection (f)(2) refers to "impermissible factors" only in relation to "departures." While the Commission deems various factors to be "impermissible" for purposes of "departure," *see* USSG §§5K2.0(d), 5K2.12, 5K2.19, 5H1.4, 5H1.7, 5H1.12, p.s., under the "departure" framework of the Guidelines Manual, these prohibitions do not extend to variances. *Irizarry*, 553 U.S. at 714-15. Thus, subsection (f)(2) does not make the guidelines or policy statements mandatory. So long as the Court does not equate "departures" with §3553(a) as a whole, as Amicus mistakenly urges, Amicus Br. 19-20, subsection (f)(2) need not be invalidated.

disparity among co-defendants), both made *legally relevant* by *Booker*, an intervening change in law. Pet'r Br. 3-11.

Amicus fails to show that application of §3742(g)(2) in this situation, or any other, would be orderly or fair. Instead, §3742(g)(2) would create absurd results and prevent district courts from imposing sentences on remand for reasons they must be permitted to consider under §3553(a).

II. AMICUS'S INCORRECT INTERPRETATION OF §3553(a) AND §3661 WOULD REINSTATE A MANDATORY GUIDELINES REGIME.

In the alternative, Amicus urges the Court to uphold the Eighth Circuit's categorical ban on consideration of post-sentencing rehabilitation under §3553(a) because such consideration is "preclude[d]" by an alleged imperative to treat identically defendants convicted of the same offense with the same criminal history without regard to differences among them, and would "contravene" the Commission's ban on such consideration as a ground for "departure," §5K2.19, p.s. Amicus Br. 23-33. According to Amicus, this would not contradict §3553(a)(1)'s command to consider the "history and characteristics of the defendant," §3553(a)(2)'s command to consider the purposes of sentencing, or §3661's command that "no limitation shall be placed" on the information a court may consider, because the enactment of §3742(g)(2) in

2003 shows that Congress "never intended" for §3553(a) or §3661 to "expand the temporal scope" of information to be considered at sentencing, and this alleged "policy" should be given effect even if §3742(g)(2) is completely invalid. *Id.* 23-24, 33-38 & n.10. These arguments fail.

A. Section 3553(a)(6) Does Not And Cannot Mandate Uniform Treatment Of Defendants Regardless Of Relevant Differences.

Amicus first claims that §3553(a)(6) "precludes" consideration of post-sentencing rehabilitation, Amicus Br. 27, 30, because it evinces Congress's intent in enacting the Sentencing Reform Act of 1984 (SRA) to require uniform treatment of defendants convicted of the same offense with the same criminal record, and thus, consideration of factors that are not part of the defendant's offense or criminal record by definition create "unwarranted disparity." *Id.* at 25-27.

This is wrong. In enacting the SRA, Congress expected that both unwarranted disparity and unwarranted uniformity would be avoided through a combination of guidelines and judicial departures taking into account *all* relevant factors. *See* S. Rep. No. 98-225, at 161 (1983) ("The key word in discussing unwarranted disparities is 'unwarranted,'" and does "not mean . . . that sentencing policies and practices should eliminate justifiable differences

between the sentences of persons convicted of similar offenses who have similar records."); *id.* at 52 ("sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case"). Thus, Congress directed the Commission to "maintain[ ] sufficient flexibility to permit individualized sentences when warranted by aggravating or mitigating factors not taken into account in the" Guidelines, 28 U.S.C. §991(b)(1)(B), to reflect "advancement in knowledge of human behavior," *id.* §991(b)(1)(C), and to include all relevant offender characteristics in the Guidelines, both aggravating and mitigating, *id.* §994(d).[8]

Under Congress's view, treating Pepper as harshly as a defendant convicted of the same crime with the same criminal history who, like Pepper, was released between sentencings, but who, unlike Pepper, did *not* abstain from drugs, complete college courses, excel in his job, strengthen his family ties, and take on new family responsibilities would constitute unwarranted uniformity. And, under Congress's

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[8] *See also* 28 U.S.C. §994(e) (noting "general inappropriateness" of considering education, vocational skills, employment, family and community ties "in recommending a term of imprisonment or length of a term of imprisonment"); S. Rep. No. 98-225, at 175 (1983) ("The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties."); *id.* at 172-75 (suggesting ways in which these offender characteristics may mitigate sentences).

view, rejecting Pepper's self-rehabilitation simply because it occurred after an initial sentencing, while taking into account similar or less impressive accomplishments of other defendants simply because they occurred before an initial sentencing, would constitute unwarranted disparity. *See* Pet'r Br. 47-48; Gov't Br. 42-43. This disparity is particularly unwarranted given that substantial opportunities for rehabilitation are available to defendants fortunate enough to be released on bail before sentencing, while such opportunities are not available to defendants who, like Pepper, are detained. *See* Brief of Federal Public and Community Defenders et al. as *Amici Curiae* in Support of Petitioner (FPD Br.) 24-27.

Amicus further contends that consideration of post-sentencing rehabilitation would inequitably benefit "lucky defendants" whose sentences are reversed on appeal, Amicus Br. 27-30, but this contention has been fully refuted by Pepper, his amici, and the government. *See* Pet'r Br. 45-48; Gov't Br. 41-46; FPD Br. 28-30; Brief of Families Against Mandatory Minimums as *Amicus Curiae* in Support of Petitioner (FAMM Br.) 21-27.

A blanket prohibition on post-sentencing rehabilitation is inconsistent with both the SRA as enacted and the individualized sentencing that is now required. *See Gall*, 552 U.S. at 49-50; *Booker*, 543 U.S. at 264-65. Any potential disparity is to be addressed by the sentencing judge in light of all of the §3553(a) factors in the individual case. *See Kimbrough*, 552 U.S. at 108.

B. The Commission's Policy Statement Cannot Forbid Consideration Of Post-Sentencing Rehabilitation Under §3553(a).

Amicus next claims that the Commission's "unequivocal" ban on post-sentencing rehabilitation as a ground for "departure," USSG §5K2.19, p.s., "should be given effect" as a binding rule applicable to variances because the Commission "articulated reasons," Congress delegated to the Commission authority to establish sentencing policies and practices, and the policy statement thus "arises from its core mission." *Id.* at 31-33. This argument patently conflicts with *Booker*'s excision of §3553(b) and this Court's decisions in *Rita* and *Gall*.

The policy statement is not entitled to "special weight," much less binding weight. Amicus Br. 32. As a categorical ban, it prohibits flexibility to consider factors not included in the Guidelines, contrary to 28 U.S.C. §991(b)(1)(B). Congress directed sentencing judges to "consider" policy statements, if "pertinent," §3553(a)(5). Consistent with the language and structure of §3553(a), policy statements cannot be elevated above other considerations – least of all a policy statement that directs judges to disregard matters made relevant by §3553(a)(1) and (a)(2). In cases like this, where the defendant's rehabilitative achievements were highly relevant to the purposes of sentencing, *see* Pet'r Br. 37-40, FPD Br. 16-19, 22-23, FAMM Br. 13-21, Gov't Br. 34-35, §5K2.19 does not even roughly approximate §3553(a)'s objectives, *Rita*,

551 U.S. at 350, much less §3553(a)'s overarching parsimony command, *Kimbrough*, 552 U.S. at 101.

Amicus declares that §5K2.19 "exemplif[ies] the Commission's exercise of its characteristic institutional role," Amicus Br. 33, but the contrary is true. First, the "reasons articulated" by the Commission, *i.e.*, that consideration of post-sentencing rehabilitation by a judge would be inequitable and would interfere with the award of good time credit, had already been thoroughly rebutted by seven courts of appeals at the time, FPD Br. 14-15, and have been again refuted by Pepper, his amici, and the government. *See* Pet'r Br. 36, 45-49; Gov't Br. 41-44, 49-51; FPD Br. 28-30; FAMM Br. 25-27. Second, the policy statement is contrary to substantial empirical research, was not based on research or national experience at the time, and has not been revisited in light of the Commission's own subsequent research and comments that have since come to its attention. FPD Br. 14-15, 16-21.

In any event, a judge may reject a policy statement that does not treat the defendant's characteristics in the proper way, *Rita*, 551 U.S. at 357, and when he does, the court of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." *Id.* at 347.

C. Section 3742(g)(2) Does Not Limit The "Temporal Scope" Of §3553(a) Or §3661.

Amicus wrongly claims that a categorical ban on post-sentencing rehabilitation does not unduly slight the "history and characteristics of the defendant," §3553(a)(1), or the purposes of sentencing, §3553(a)(2), nor does it violate §3661's command that "no limitation shall be placed" on the information a court may consider, because §3742(g)(2), even if completely invalid, contains a "policy" limiting the "temporal scope" of such information. Amicus Br. 23, 33-36, 38 n.10.

This argument is deeply flawed. First, Amicus's main premise is that the Court should "interpret statutory provisions consistently," Amicus Br. at 34, but there is no authority for the proposition (and Amicus has cited none) that a constitutionally invalid statute may be used to carve out exceptions to a valid statute.

Second, Amicus's contention that §3742(g)(2) contains some sort of inchoate, but binding, "policy," independent of the text or even its validity, which sets the "temporal scope" of §3553(a) and §3661, Amicus Br. 35, is incorrect. One flaw of this argument is that this "policy" is not found in the text of the statute, *Kimbrough*, 552 U.S. at 102-03, and the actual policies the text contains produce unconstitutional,

invalid, and frequently absurd results." *See* Part I, *supra*. Indeed, as written, §3742(g)(2) places absolutely no limit, temporal or otherwise, on facts a court may consider at resentencing in determining where to sentence *within* the guideline range. Thus, Congress's aim in §3742(g)(2) was not, as Amicus would have it, to generally ban consideration of facts on a *temporal* basis. On the contrary, the aim of §3742(g)(2) was to restrict the imposition of sentences outside the guideline range. *See* H.R. Conf. Rep. No. 108-66, at 59 (2003). Amicus makes no showing at all that Congress desired, independent of that aim, to place a "temporal" limit on evidence a judge may consider in imposing sentence on remand.

Third, Amicus's claim that §3742(g)(2) somehow "confirms that Congress never intended" §3553(a) or §3661 "to expand the temporal scope of information" to be considered by the sentencing judge, Amicus Br. 24, 33, 36, is wrong. When Congress enacted the SRA in 1984 and ever since, it has been clear beyond doubt that courts are entitled to rely on facts that arose after the initial sentencing. *See Wasman v. United*

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[9] It is hardly even clear that the text of §3742(g)(2) precludes consideration of post-sentencing facts in imposing a "departure" on remand. When §3742(g)(2) was still thought to be valid before *Booker*, courts held that it did not apply to information, *United States v. Martin*, 363 F.3d 25, 40 (1st Cir. 2004), or legal grounds, *United States v. Lynch*, 378 F.3d 445, 449 n.4 (5th Cir. 2004), *United States v. Lauersen*, 348 F.3d 329, 344 n.16 (2d Cir. 2003), that could only have arisen after the previous sentencing.

States, 468 U.S. 559, 571-72 (1984); *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969); Pet'r Br. 42-44 & nn.20-23. Congress specifically re-enacted §3661 and enacted the new §3553(a), thus strongly reiterating the traditional policy that, on resentencing, a court may rely on any facts, with "no limitation." Congress is presumed to legislate in light of prevailing law, *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979), and, by "specifically insert[ing]" §3661 "into the Act," Congress "expected this system to continue," *Booker*, 543 U.S. at 251. In enacting §3742(g)(2) nearly twenty years later, Congress evinced not the slightest desire to place a "temporal" limitation on facts. Instead, it enacted a provision designed to make the Guidelines more mandatory. Because the "policy" Amicus seeks to make binding was a mere side-effect of an unconstitutional regime, and because there is no indication Congress intended it to apply outside that context, the alleged "policy" cannot act as a positive restriction on courts' discretion when the Guidelines are not mandatory.

Amicus further claims that courts "regularly uphold" limitations contrary to the plain text of §3661, Amicus. Br. 35-36, but cites no case in which a court actually did that.[10] To be sure, the Eighth Circuit

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[10] *See United States v. Guzman*, 236 F.3d 830, 833 (7th Cir. 2001) (declining to rule that cultural heritage could never be considered, even though the Guidelines were mandatory at the time and a policy statement could be read to preclude it); *United States v. Luna*, 332 Fed. Appx. 778, 783 (3d Cir. 2009) (declining to find procedural error in district court's refusal to consider

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issued a blanket prohibition on the history and characteristics of the defendant in this case under its improper standard of review, but this prohibition violates §3553(a), §3661, and this Court's decisions in *Booker*, *Rita*, *Gall* and *Kimbrough*. *See* Pet'r Br. 22-35.

III. OTHER "PROCEDURAL MECHANISMS" DO NOT ADDRESS, AND ARE NO SUBSTITUTE FOR, JUDICIAL CONSIDERATION OF POST-SENTENCING REHABILITATION IN IMPOSING A SENTENCE THAT COMPLIES WITH §3553(a).

Amicus presses the argument that the award of good time credit and a judge's consideration of post-sentencing rehabilitation somehow double count the same conduct, Amicus Br. 39-40, but this is incorrect, as Pepper and the government have explained. *See* Pet'r Br. 48-49; Gov't Br. 49-51; *see also United States v. Bradstreet*, 207 F.3d 76, 83 (1st Cir. 2000). Acknowledging that this spurious theory could not apply in this case in any event because Pepper's self-rehabilitation occurred after he was released, Amicus

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defendant's argument based on cultural heritage which was without factual support); *United States v. Dean*, 604 F.3d 169, 174 (4th Cir. 2010) (declining to apply limitation on permissible documents under *Shepard v. United States*, 544 U.S. 13 (2005), to determine date of an arrest under the guidelines because, "under *Rita* and *Gall*, sentencing courts are licensed to find a host of facts and to assign weight and relevance to those findings as they reasonably see fit.").

must fall back on an argument that supervised release might be terminated early or the government might move for departure under Rule 35(b) for substantial assistance. Amicus Br. 40-41. This evades the central point that, like good time credit, early termination of supervised release and departure for cooperation with the government do not address, and are no substitute for, a judge's imposition of a sentence that is not longer than necessary, in light of the defendant's rehabilitation, to satisfy the purposes of sentencing under §3553(a). Supervised release follows a term of imprisonment, and serves a different purpose than a sentence imposed under §3553(a). *See United States v. Granderson*, 511 U.S. 39, 50 (1994); *United States v. Johnson*, 529 U.S. 53, 59 (2000); USSG, Ch. 7, Pt. A(2)(b). Rule 35(b) departures address *only* cooperation with the government. *United States v. Poole*, 550 F.3d 676, 680-81 (7th Cir. 2008). Notably, Rule 35(b) departures result in disparity based on the happenstance of whether a particular defendant has any information to give, and whether the prosecutor in his sole discretion decides to recognize it, but this disparity is not deemed "unwarranted." *See* Pet'r Br. 45.

IV. THE GOVERNMENT FAILS TO ADDRESS PEPPER'S ARGUMENT THAT JUDGE BENNETT'S RULING, RATHER THAN ANY COURT OF APPEALS RULING, ESTABLISHED THE LAW OF THE CASE.

The government argues that the decisions of the *court of appeals* did not compel Judge Reade to adopt Judge Bennett's finding that a 58-month sentence was appropriate in light of Pepper's substantial assistance to the government.[11] Gov't Br. 16-19, 22, 25-26. Pepper's primary argument, however, is and has always been that "even if the [Eighth Circuit's] *remand order* did not obligate Chief Judge Reade to leave Judge Bennett's ruling in place, the *law of the case doctrine* did." Pet'r Br. 58; *see also* Pet'r C.A. Br. 23-26, 29-31; Pet. i, 19-20, 23, 25.

The government further argues that since the decision in *Pepper II* was vacated and remanded by this Court, this also included the "holding on the substantial assistance departure," and thus, *Pepper II* did not bind the new judge at resentencing. Gov't Br. 19. Although the court of appeals' judgment in *Pepper II* was vacated and the case remanded for further consideration in light of *Gall,* this vacatur did not touch and was not related to Judge Bennett's substantial assistance departure. J.A. 210. Judge Bennett's ruling was never "set aside" by the court of

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[11] Amicus adopts the government's arguments regarding the law-of-the-case issue. Amicus Br. 1.

appeals or this Court. In fact, the ruling was affirmed in *Pepper II*, and never revisited thereafter. This was understood by the court of appeals in *Pepper III*, when it failed to revisit the §5K1.1 departure. J.A. 213. Because Judge Bennett's ruling was never "set aside" by any higher court, it remained the law of the case and should have been respected as such.

The government cites three cases to support its argument that when this Court vacated *Pepper II*, its holding no longer bound Judge Reade at resentencing. Gov't Br. 19. The first two cases state that when this Court vacates the decision of a court of appeals, that decision loses precedential value. *See County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 577-78 n.12 (1975). These cases are irrelevant because Pepper's law-of-the-case argument does not rely on the precedential value of any court of appeals decision.

In the third case, *United States v. Atkinson*, 15 F.3d 715 (7th Cir. 1994), the defendant did not raise the law-of-the-case argument that Pepper raises here. The phrase "law of the case" is nowhere mentioned in the opinion. As this Court has long observed, "'[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

Atkinson did not involve a judge discarding a fellow judge's ruling despite the fact that the earlier ruling was never vacated and no new pertinent evidence had been presented. Instead, it involved a single judge modifying her *own* prior ruling following a resentencing at which new evidence was presented, a lower sentencing range was made applicable, and new consideration was necessary to impose a "sentence sufficient, but not greater than necessary" to comply with §3553(a)(2). *Atkinson*, 15 F.3d at 716-19. *Atkinson* thus has no bearing on the strength of Pepper's law-of-the-case argument.

In short, the government fails to identify any flaw in Pepper's argument that Judge Reade's decision to jettison Judge Bennett's ruling regarding Pepper's substantial assistance flew directly in the face of the law of the case doctrine.

CONCLUSION

For the above-stated reasons and those given in Pepper's opening brief, and for the reasons in his amici's briefs, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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App. 1

18 U.S.C. § 3742(g)

(g) Sentencing upon remand. A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that –

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that –

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

18 U.S.C. § 3742(j)

(j) Definitions. For purposes of this section –

(1) a factor is a "permissible" ground of departure if it –

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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In the Supreme Court of the United States

JASON PEPPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari To United States Court of Appeals For The Eighth Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

Families Against Mandatory Minimums (FAMM) is a national nonprofit, nonpartisan organization. FAMM's mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing thousands of individuals whose lives have been affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM promotes sentencing policies that give judges discretion to distinguish among differently situated defendants and to sentence them according to their role in the offense, the seriousness of the offense, their potential for rehabilitation, and other characteristics of the offender. FAMM believes that the punishment always must fit the crime—and the criminal. FAMM's vision is a nation in which sentencing is individualized, humane, and sufficient but not greater than necessary to impose just punishment, secure public safety, and support the successful rehabilitation of offenders.

FAMM submits this brief because the Eighth Circuit's categorical rule prohibiting the consideration of post-sentencing rehabilitation on resentencing

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

is an arbitrary and unjustified limitation on the discretion of the district courts. That rule, which most other circuits have properly rejected, has no support in the laws that Congress has enacted and is at odds with the sentencing scheme put in place by this Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005), and *Gall v. United States*, 552 U.S. 38 (2007). More broadly, as the facts of this case powerfully demonstrate, the Eighth Circuit's misguided approach perversely harms the very individuals that a just and fair sentencing system ought to reward—those who have made significant and successful efforts to turn their lives around.

SUMMARY OF ARGUMENT

This case principally presents the question whether a federal district court may consider a defendant's post-sentencing rehabilitation in fashioning an appropriate sentence after the original sentence has been set aside on appeal. That is not a difficult question. As even the Government now concedes, the answer is yes. That follows from the text of 18 U.S.C. § 3553(a), from this Court's decisions in *Booker* and *Gall*, and from fundamental philosophical principles that have long been integral to the American criminal-justice system.

Since this Court rendered the sentencing guidelines advisory and made appellate review of all sentences deferential, district courts have broad discretion to vary from the guidelines as appropriate to meet the criteria set out in section 3553(a). Appellate courts do not have roving commissions to categorically preclude sentencing courts from considering particular factors. And it was especially inappropriate for the Eighth Circuit to prohibit the use of post-sentencing rehabilitation evidence.

Taking account in the sentencing process of a defendant's successful transformation into a law-abiding citizen is compelled by the principle of parsimony—a philosophical maxim with deep roots that is at the heart of the post-*Booker* sentencing regime. As distilled by Congress into federal law, the parsimony principle requires courts to "impose a sentence sufficient, *but not greater than necessary*, to comply" with the purposes of punishment enumerated in section 3553(a)(2). Each of those purposes is served when a rehabilitated defendant sees his positive strides reflected in a lesser sentence. And each is frustrated by a holding that such rehabilitation is categorically irrelevant in resentencing proceedings. The Eighth Circuit's ruling is also contrary to Congress' directive that sentencing courts must consider "the history and characteristics of the defendant." In short, there is no legal or moral reason why such rehabilitation should be ignored just because it took place after the original sentence was imposed.

But the problems with the Eighth Circuit's approach go even deeper. Requiring courts to close their eyes to the reality of a defendant's life experiences is contrary to the basic requirements of a humane system of justice, one that allows for the individualized consideration of individual circumstances and insists on the treatment of all people, including criminal defendants, as ends rather than as means. A defendant must be sentenced based on who he is, not just who he was. Those principles are part of the fabric of federal sentencing law. A sentence imposed by a court that has blinded itself to a defendant's rehabilitation is all but guaranteed to be greater than necessary to achieve its purposes—and is therefore unjust and unlawful. That is certainly so of the sentence that Mr. Pepper received in this case.

The principal justifications offered for refusing to consider post-sentencing rehabilitation do not withstand scrutiny. The idea that courts are limited to evidence available at the time of the original sentencing is simply wrong. It is contrary to this Court's cases, which make clear that intervening events can and should be considered on resentencing. It is also at odds with the Eighth Circuit's own practices and with basic notions of procedural fairness. Nor does accounting for a defendant's rehabilitation after sentencing introduce unwarranted disparity. Federal law seeks to discourage judges from giving different sentences to defendants with similar records. But that concern is not implicated by allowing sentencing courts to consider rehabilitation, whenever it occurs. To the contrary, it is the Eighth Circuit's approach that leads to improper disparity, allowing some offenders to see their rehabilitation reflected in lesser sentences while forcing courts to turn a blind eye to others' comparable efforts. That result, which excessively punishes people like Mr. Pepper in service of an artificial equality, is unjust and indefensible.

Finally, the inequity of ignoring Mr. Pepper's rehabilitation was compounded by the Eighth Circuit's unwarranted reassignment of this case to a new judge, who failed to honor Judge Bennett's prior rulings that the appellate court had not questioned. The Eighth Circuit took this case away from Judge Bennett for doing nothing more than echoing this Court's statements about the need for district court sentencing discretion. The outcome was a significantly increased sentence, which took Mr. Pepper away from his productive life and forced him to return to prison. This Court should reject a result that allows such reassignments to evade the limits on appellate review imposed by *Booker* and *Gall*.

ARGUMENT

I. Under The Advisory Guidelines Regime, Federal Courts Are Permitted To Account for Post-Sentencing Rehabilitation.

In three successive opinions in this case, the Eighth Circuit announced and applied the following rule: "Pepper's post-sentencing rehabilitation was an impermissible factor to consider in granting a downward variance." J.A. 172 (*Pepper II*); J.A. 217-18 (*Pepper III*); J.A. 376-77 (*Pepper IV*). The court of appeals did not doubt that Mr. Pepper had significantly rehabilitated himself since his release from prison. Nor did it question the sincerity of Mr. Pepper's efforts or their lasting effect. J.A. 376 ("We commend Pepper on the positive changes he has made in his life."). The Eighth Circuit instead deemed those efforts categorically irrelevant to the district court's resentencing determination.

In so holding, the court of appeals never engaged with the text of section 3553(a) or with this Court's decisions in *Booker* and *Gall*. Nor did the other cases on which the panel relied. See *United States v. McMannus*, 496 F.3d 846, 851-52 (8th Cir. 2007); *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007). That is perhaps not surprising. The Eighth Circuit's rule is at odds with the statutory text and with the broad discretion that district courts now have to fashion sentences appropriate to the particular circumstances of individual defendants. It is also contrary to the "overarching" congressional requirement of parsimony at the heart of section 3553(a). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

A. District courts now have broad discretion to make individualized sentencing determinations.

Before this Court's decision in *Booker*, federal sentencing courts faced two conflicting commands. On the one hand, they were required to "consider" an enumerated list of factors, including (but not limited to) the applicable guidelines range, and to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment set out in the statute. 18 U.S.C. § 3553(a). On the other hand, they were instructed to "impose a sentence of the kind, and within the range," provided by the applicable guidelines. § 3553(b)(1).

Booker resolved that tension decisively in favor of section 3553(a). The Remedial Opinion severed and excised section 3553(b)(1), along with section 3742(e), which mandated de novo appellate review of sentences outside the guidelines range. *Booker*, 543 U.S. at 259. Those provisions made the guidelines mandatory and used rigid appellate review to make them "even more mandatory." *Id.* at 261. *Booker* made clear that those limits on the district courts' discretion were no longer appropriate. The Court viewed a purely advisory guidelines system as the best way to avoid "excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264-65.

In the wake of *Booker*, federal sentencing policy is governed not by the guidelines but by the broader dictates of section 3553(a). This Court explained in *Gall* how this new system works:

> As a matter of administration and to secure nationwide consistency, the Guidelines

> should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.

Gall, 552 U.S. at 49-50 (internal citations omitted).

Three aspects of this system are especially important here. First, the sentencing court must consider "all" of the section 3553(a) factors in determining the sentence. Second, that court "must make an individualized assessment based on the facts presented." Third, the sentencing court has broad leeway to determine that its individualized assessment of the various factors calls for a sentence outside the advisory guidelines range. Thus, while the guidelines continue to play a role, "there is no longer any limit comparable" to those that existed before *Booker* "on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a)." *Irizarry v. United States*, 553 U.S. 708, 128 S. Ct. 2198, 2202-03 (2008).

The district courts' newfound discretion is reinforced by the limited and deferential role allotted to the courts of appeals. Whether the sentence is inside or outside the guidelines range, "appellate review of sentencing decisions is limited to determining whether they are 'reasonable.'" *Gall*, 552 U.S. at 46. For non-guidelines sentences

> the court [of appeals] may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give *due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance*. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Id. at 51 (emphasis added).

In this new system, the factors a district court may consider in imposing a sentence are dictated by section 3553(a). So long as consideration of a given factor is supported by the statute (and not forbidden by the Constitution), the courts of appeal have no business depriving sentencing courts of their discretion to rely on that factor. Cf. *Williams v. United States*, 503 U.S. 193, 205 (1992) ("except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence'") (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983)).

These same rules apply in resentencing proceedings. The statute instructs that following a remand of an erroneous sentence, the district court "shall re-

sentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals." 18 U.S.C. § 3742(g).[2] Cf. *Dillon v. United States*, 130 S. Ct. 2683, 2690-91 (2010) (distinguishing *resentencing* under section 3742(g) from sentence *modification* under section 3582(c)). In a resentencing, the district court is bound by the procedural and substantive commands of section 3553(a), just as in any other sentencing proceeding. And the constraints that *Gall* imposes on appellate review apply equally in this context.

B. The parsimony directive requires courts to take account of rehabilitation, whenever it occurs.

These principles decide this case. Nothing in section 3553(a) bars district courts from considering post-sentencing rehabilitation in fashioning an appropriate sentence. To the contrary, considering rehabilitation, whenever it occurs, is necessary to comply with the statute's core substantive command to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in section 3553(a)(2). 18 U.S.C. § 3553(a). This provision is an elegant distillation of the philosophical idea of parsimony, a bedrock principle of American criminology from the founding era to the present day.

1. The parsimony principle can be traced back at least to Montesquieu, who wrote in 1748 that "[a]ll

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[2] Section 3742(g)(2) purports to limit district courts' discretion on remand to impose a sentence below the applicable guidelines range. But, as the Government now concedes, that provision suffers from precisely the same infirmities that led the Court in *Booker* to excise Section 3742(e). Br. for the United States 48 ("Section 3742(g)(2) is invalid after *Booker*.").

punishment which is not derived from necessity is tyrannical." BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, Bk. XIX.14 (G. Bell & Sons, Ltd. 1914). This simple but profound idea was immensely influential on generations of later thinkers. Writing in 1764, the pioneering criminologist Cesare Beccaria acknowledged his debt to Montesquieu:

> Every punishment which does not arise from absolute necessity, says the great Montesquieu, is tyrannical. A proposition which may be made more general thus. Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. It is upon this then, that the sovereign's right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.

CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 20 (Adolph Caso ed. 1984). On this basis, Beccaria argued that criminal punishments must be strictly limited to the minimum necessary to preserve public peace and security, for "all that extends beyond this, is abuse, not justice." *Id.*

The English philosopher Jeremy Bentham advocated a similar principle, which he justified in more overtly utilitarian terms. "The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore *The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here*

given." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES AND MORALS OF LEGISLATION, ch. XIV, para.13 (1781). These thinkers and their ideas had great influence on the founding generation in America. "In every colony, the ideas and writings of such social critics and reformers as Voltaire, Rousseau, Montesquieu, and Beccaria were known and often quoted." Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 813 (1975); see also *Ullmann* v. *United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting) ("Beccaria and his French and English followers influenced American thought in the critical years following our Revolution.").

In the twentieth century, influential criminal law reformers such as Norval Morris identified parsimony as one of the bedrock principles that must guide any legitimate sentencing process. In Morris's formulation, the parsimony principle required that "the least restrictive or least punitive sanction necessary to achieve a defined social purpose should be chosen." Norval Morris, *The Future of Imprisonment: Toward A Punitive Philosophy*, 72 MICH. L. REV. 1161, 1162 (1974). Punishment not limited by an idea of parsimony is immoral and wasteful—such punishment is "merely gratuitous, serving no legitimate purpose." Sharon Dolovich, *Legitimate Punishment in a Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 401 (2004). The parsimony principle thus provides an important reminder that "punishment requires moral justification" and that "more punishment than necessary to the purpose of retribution is not justifiable." Mary Ellen Gale, *Retribution, Pu-*

nishment, and Death, 18 U.C. DAVIS L. REV. 973, 1015 n.123 (1985). As Morris explained, a "system of criminal justice that is not infused with parsimony in punishment . . . creates an intolerable engine of tyranny." NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 155 (1982).

When Congress enacted the Sentencing Reform Act, it codified this philosophical idea. The requirement that courts not impose a sentence "greater than necessary" to comply with the specified purposes of punishment turns the parsimony principle into a command of federal law. The statutory purposes reflect four generally accepted justifications for criminal punishment: retribution; deterrence; incapacitation; and rehabilitation. 18 U.S.C. § 3553(a)(2)(A)-(D). Courts must ensure that no sentence exceeds the "least severe" sanction that is sufficient to comply with those purposes. *United States v. Martinez-Barragan*, 545 F 3d 894, 904 (10th Cir. 2008). As a result of *Booker*, the parsimony provision now stands as the sole substantive mandate that binds district judges when they impose sentences. See *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008) (describing section 3553(a) as "a tapestry of factors, through which runs the thread of an overarching principle * * * sometimes referred to as the 'parsimony principle'").[3] Any appellate rule that frustrates

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[3] On the meaning of the parsimony provision, compare *United States v. Kikumura*, 918 F.2d 1084, 1111 (3d Cir. 1990) (what § 3553(a) requires is "minimally sufficient" sentence) (Becker, J.), with *United States v. Pruitt*, 502 F.3d 1154, 1175 (10th Cir. 2007) (concurring opinion, erroneously characterizing parsimony as evenhanded "Goldilocks principle," requiring a sentence to be "not ...too high, and not ... too low"), cert. granted, judgment vacated, and remanded, 552 U.S. 1306 (2008).

the overarching command of a minimally sufficient sentence is unsustainable.

2. The Eighth Circuit's categorical ban on considering a defendant's post-sentencing rehabilitation is irreconcilable with the statutory requirement of parsimony. Each of the purposes listed in section 3553(a)(2) is advanced when courts rely on a defendant's successful rehabilitation as a basis for imposing a lesser sentence. And each is frustrated when such rehabilitation is ignored. Consider each of the statutory purposes in turn:

a. ***"to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."*** As this Court recognized in *Gall*, this provision does not invariably point towards harsher sentences. Referring to the "unique facts of Gall's situation"—which included his voluntary rehabilitation—the Court agreed that "a sentence of imprisonment may work to promote not respect, but derision, of the law, if the law is viewed merely as a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Gall*, 552 U.S. at 54. Thus, when an offender has rehabilitated himself, the purposes of promoting "respect for the law" and providing "just punishment" call out for a lesser sentence. Precluding courts from taking account of such rehabilitation invites the very derision and dehumanization of the law that *Gall* condemned.

b. ***"to afford adequate deterrence to criminal conduct."*** An offender's rehabilitation is plainly relevant to determining the quantum of punishment necessary to achieve deterrence. *Gall* expressly stated that a defendant's "self-motivated rehabilitation" "lends strong support to the conclusion that

imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts. See 18 U.S.C. §§ 3553(a)(2)(B), (C)." *Gall*, 552 U.S. at 59. Refusing to take account of genuine rehabilitation, whenever it occurs, makes it impossible to properly calibrate the sentence to the objective of deterrence. Indeed, that approach may be more of a deterrent to future *rehabilitation* than to crime.

c. ***"to protect the public from further crimes of the defendant."*** By definition, a rehabilitated offender "is not going to return to criminal behavior and is not a danger to society." *Gall*, 552 U.S. at 57. That is true regardless of whether the rehabilitation happens before or after his original sentencing.[4] And, as Judge Leval has explained, section 3553(a)(2)(C) "unquestionably envisions more severe sentences for defendants considered more likely to commit further crimes and less severe sentences for those unlikely to commit crimes." *United States v. Rodriguez*, 724 F. Supp. 1118, 1120 (S.D.N.Y. 1989). Yet the Eighth Circuit's rule makes it impossible for sentencing courts to honor that goal and mocks the parsimony directive. Congress' insistence that courts formulate the least restrictive sentence necessary to protect the public cannot be squared with a rule that precludes courts from even considering that an of-

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[4] Post-sentencing rehabilitation is arguably *more* relevant than other kinds of post-offense rehabilitation. It is unlikely that an offender who has already been sentenced would engage in a show of rehabilitation in an effort to obtain a lenient sentence in the possible event of a resentencing. A court thus would have "greater justification for believing that [Pepper's] turnaround was genuine, as distinct from a transparent attempt to build a mitigation defense." *Gall*, 552 U.S. at 57.

fender has rehabilitated himself to the point where he no longer poses a realistic threat of criminal activity.

d. ***"to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."*** This factor expressly promotes rehabilitation as a proper goal of sentencing. See *United States v. Rhodes*, 145 F.3d 1375, 1381-82 (D.C. Cir. 1998). In the case of Mr. Pepper, who at the time of his resentencing was living successfully and productively outside of prison, it pointed in favor of a sentence that would have allowed him to continue that success in the outside world. A sentence that required him to give up his new life and return to prison was "greater than necessary" to ensure that he was rehabilitated "in the most effective manner."

* * *

The overarching statutory command of parsimony demands that courts take account of rehabilitation, whenever it occurs. The Eighth Circuit's categorical ban ensures that rehabilitated offenders will receive sentences greater than necessary to bring about the purposes that Congress has specified. That is certainly true of the new (65 month) sentence that Mr. Pepper received in this case—a sentence that tore him away from the successful life he had built in the community. That sentence vastly exceeds what is necessary to promote respect for the law, to deter other criminal conduct, to prevent future crimes, and to help Mr. Pepper rehabilitate. Indeed, the new sentence undermined every one of those goals. The additional punishment inflicted by the Eighth Circuit's rule thus is precisely the sort of

gratuitous punishment that the parsimony principle condemns and that section 3553(a) forbids. In Beccaria's words, that sentence is "abuse, not justice."

C. The requirement that courts consider the defendant's "history and characteristics" requires accounting for post-sentencing rehabilitation.

Section 3553(a)'s procedural requirements likewise require courts to take account of the fact that a defendant has rehabilitated himself prior to being sentenced.

The very first factor that Congress directs sentencing courts to consider is "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). This provision mandates individualized consideration of each defendant's individual circumstances. The court must treat the defendant as a unique human being with a particular set of experiences that makes him more or less in need of punishment for his offense. Whether a defendant has rehabilitated—renounced criminal activity; committed himself to family life; overcome a drug addiction; become a productive member of society—is plainly an important part of his "history and characteristics."

This provision imposes no temporal limits. It directs the court to reflect upon the life experiences of the offender *as he stands before the court*. See *United States v. Core*, 125 F.3d 74, 77 (2d Cir. 1997) ("When the trial court undertook to resentence Reyes . . . it was required to consider him as he stood before the court at that time."). Rehabilitation that takes place after the defendant is convicted is as much a part of his background as earlier rehabilitation. Si-

milarly, where a new sentencing is required, nothing in section 3553(a)(1) supports treating post-sentencing rehabilitation as irrelevant. Making the distinction that the Eighth Circuit did reads into the statute a restriction that simply is not there. See *United States v. Green*, 152 F.3d 1202, 1207 (9th Cir. 1998) ("[W]e cannot discern any meaningful distinction between post-offense and post-sentencing rehabilitation.").

If section 3553(a)(1) were not clear enough, another provision of the statute makes clear that "*[n]o limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted on an offense which a court of the United States may receive and consider for purposes of imposing an appropriate sentence." 18 U.S.C. § 3661 (emphasis added); see also 21 U.S.C. § 850 (similar provision for sentencing drug offenders). Congress wanted sentencing courts to have as much information as possible about the defendant's "character" and "conduct," so as to make a reasoned judgment about what sentence would be most appropriate to that defendant's particular circumstances. The Eighth Circuit's rigid exclusionary rule is directly at odds with that purpose and violates these controlling statutes..

In short, there is "no reason why sentencing courts' broad mandate under section 3553(a) and 3661 to sentence defendants as they stand before the court—whether after plea bargaining, trial, or appeal, should exclude consideration of post-conviction rehabilitation." *Rhodes*, 145 F.3d at 1381; see also *Core*, 125 F.3d at 77 (holding that to bar departures based on post-conviction rehabilitation would "undermine the statutory requirement to consider the

characteristics of the defendant"); *United States v. Maier*, 975 F.2d 944, 948 (2d Cir. 1992) (same).

D. In a just and humane sentencing system, courts may not blind themselves to relevant facts about a defendant's life.

The statutory directives requiring wide-ranging consideration of an offender's history and character are not just command of positive law. They reflect a deep-seated understanding in the American legal tradition that to impose a just and humane sentence, a court must be able to account for the full range of the offender's life experiences.

This Court has repeatedly embraced the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247 (1949). "Highly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Ibid.* *Williams* thus rejected the idea that sentencing courts should be "denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules" and cautioned that depriving judges of "information concerning every aspect of a defendant's life" would "undermine modern penological procedural policies." *Id.* at 247-50; see also *Roberts v. United States*, 445 U.S. 552, 556 (1980).

The same principles apply to resentencing proceedings. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court approved of judges fashioning new sentences "in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental

and moral propensities.'" 395 U.S. at 723 (quoting *Williams*, 337 U.S. at 245). Likewise, in a case decided the year that Congress enacted the Sentencing Reform Act, the Court made clear that the

> sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant. * * * Allowing consideration of such a breadth of information ensures that the punishment will suit not merely the offense but the individual defendant.

Wasman v. United States, 468 U.S. 559, 563-64 (1984). *Wasman* condemned the "needless exclusion of relevant sentencing information from the very authority in whom the sentencing power is vested" and reaffirmed that the "underlying philosophy of modern sentencing is to take into account the person as well as the crime by considering 'information concerning every aspect of a defendant's life.'" *Id.* at 572 (quoting *Williams*, 337 U.S. at 250).

Reflecting on this philosophy, the Court observed: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). This approach was preserved in the original Sentencing Reform Act (*ibid.*) and is even more important in the advisory guidelines regime that emerged from *Booker*. See *Gall*, 552 U.S. at 52 (quoting *Koon*). A ban on considering post-sentencing rehabilitation is antithetical to this "uniform and constant tradition."

Individualized sentencing based on full and complete information about the defendant is a moral principle, not just a legal one. It is a crucial reminder that, despite their crimes, criminal defendants are still human beings, who are entitled to be judged based on the totality of their experiences, bad and good. Requiring sentencing courts to blind themselves to so important a part of Mr. Pepper's life as his near-total rehabilitation violates that principle. In so doing, it drains sentencing of its moral force and threatens to transform it into "ritualistic punishment with a high potential for destruction." *Rodriguez*, 724 F. Supp. at 1119.

In a 2003 address to the American Bar Association, Justice Kennedy sounded this theme with particular eloquence. After condemning "a rigid egalitarian approach to sentencing uniformity" that devalues judicial discretion, Justice Kennedy discussed the importance of rehabilitation:

> We must try, however, to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose mind and spirits we are trying to reach. We should not ignore the efforts of the countless workers and teachers and counselors who are trying to instill some self-respect and self-reliance and self-discipline in convicted offenders.

Anthony M. Kennedy, *Speech At The American Bar Association Annual Meeting* 5-7 (Aug. 9, 2003). When, a convicted offender like Mr. Pepper attains enough self-reliance and self-disciple to turn his life around, that remarkable transformation should be

cherished and rewarded. To dismiss it as "irrelevant" (as the Eighth Circuit did) does not merely violate the controlling statutes, it sends precisely the wrong message about the values of our criminal justice system. As Judge Bennett observed in discussing Mr. Pepper's rehabilitation, "[a]ny sentencing scheme that ignores that is not a sentencing scheme based in the reality of the human life and human existence." J.A. 148.

II. The Eighth Circuit's Attempts To Justify Its Ban On Post-Sentencing Rehabilitation Evidence Do Not Withstand Scrutiny.

The Eighth Circuit's attempts to defend its approach to post-sentencing rehabilitation are transparently weak. The court has offered two primary reasons for its rule: first, that a resentencing court is necessarily limited to the evidence that was available when the original sentence was imposed; second, that doing otherwise creates unwarranted disparities. Neither argument has merit.[5]

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[5] Some Eighth Circuit decisions tried to justify the ban on the additional ground that for courts to consider post-sentencing rehabilitation "is inconsistent with the policies established by Congress under 18 U.S.C. § 3642(b) for reducing the time to be served by a prisoner." *United States v. Hasan*, 245 F.3d 682, 689 (8th Cir. 2001) (en banc). This rationale obviously has no application to this case, in which Mr. Pepper's rehabilitation did not take place in prison, but occurred after his release. Relying on such conduct could not even conceivably "interfere with the Bureau of Prison's statutory power to award good-time credit to prisoners." *United States v. Sims*, 174 F.3d 911, 913 (8th Cir. 1999). In any event, for reasons explained by Mr. Pepper, the interference-with-good-time-credits argument is a canard. Br. for Petitioner 48-49.

A. A defendant's good conduct is not irreverent merely because it occurs after his original sentencing.

The Eighth Circuit has suggested that banning the use of post-sentencing rehabilitation evidence is justified because "the sentencing court obviously could not have considered it at the time of the original sentencing." *United States v. Sims*, 174 F.3d 911, 913 (8th Cir. 1999); see also *United States v. Jenners*, 473 F.3d 894, 898-99 (8th Cir. 2007); *United States v. Hasan*, 245 F.3d 682, 688 (8th Cir. 2001) (en banc). Among its other problems, this artificial limit on the resentencing process cannot be squared with this Court's decisions in *Pearce* and *Wasman*.

Pearce stands for the proposition that when a court resentences a defendant whose original conviction (or sentence) was overturned on appeal, the court can—and should—consider events after the original sentence was imposed. The resentencing court thus may impose a more severe sentence "based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Pearce*, 395 U.S. at 726. The Court explained:

> The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York*, *supra*, that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."

Id. at 723 (quoting *Williams*, 337 U.S. at 247).

Wasman similarly affirmed that a resentencing occasioned by legal error in a prior proceeding is not hermetically sealed from the world as it may have changed in the interim. In particular, the Court held that "a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings." *Wasman*, 468 U.S. at 572. "Consideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial is manifestly legitimate." *Id.* at 569-70. Thus, even though the court obviously could not have considered Wasman's second conviction at the time of the original sentencing, the Court rejected any notion that the conviction was irrelevant in crafting a new sentence.

Basic fairness requires that this rule apply equally to good conduct as it does to bad conduct. If a defendant can receive a stiffer sentence in a resentencing when he continues to violate the law, it follows that a defendant who successfully rehabilitates himself during that time should be eligible to get a lesser sentence. The use of post-sentencing conduct in resentencing cannot be a one-way ratchet that allows harsher sentences but bars more lenient ones. Cf. *Booker*, 543 U.S. at 266 (rejecting argument in favor of mandatory limits on "judge's ability to *reduce* sentences" but not on "judge's ability to *increase* sentences": "We do not believe that such one-way levers are compatible with Congress' intent").

The Eighth Circuit's ban on considering post-sentencing rehabilitation is particularly perverse in this respect. The court has held that a defendant's misconduct after his original sentencing can support a *higher* sentence on resentencing. *United States v.*

Stapleton, 316 F.3d 754, 757 (8th Cir. 2003). But the court nonetheless refuses to allow defendants to benefit from positive accomplishments or any other good they do in that same period. *Ibid.* Such an obvious double-standard is unsustainable in proceedings governed by due process of law. Cf. *Green*, 152 F.3d at 1208 n.6 (relying on cases where the government benefited from post-sentencing circumstances to secure a higher sentence and holding that defendants may rely on such circumstances to support lower sentences on resentencing).

Finally, the Eighth Circuit's temporal argument has no conceivable application in this case given the court's observation in *Pepper IV* that "[u]nder the circumstances of Pepper's case, a complete resentencing without any restrictions on the district court's discretion was preferable, in contrast to a partial, piecemeal resentencing limiting the sentencing judge's discretion." J.A. 373-74. A "complete resentencing"—that is a complete vacatur of the prior judgment, to be followed by imposition of a new and lawful sentence—would necessarily include consideration of Mr. Pepper's circumstances as they stood when his new sentence was imposed. But that is precisely what the Eighth Circuit then forbade. For the court to rely on the idea of a "complete resentencing" to (erroneously) deprive Mr. Pepper of Judge Bennett's favorable rulings while at the same time refusing to allow his recent rehabilitation to be considered is as unfair as it is illogical. It illustrates a selective deployment of procedural rules in the service of higher sentences and to the detriment of criminal defendants. Federal sentencing law, a long line of this Court's decisions, and elemental ideas of fair play forbid that approach.

B. Considering post-sentencing rehabilitation does not create unwarranted sentencing disparity.

The Eighth Circuit has also tried to justify its approach on the grounds that allowing consideration of post-sentencing rehabilitation "seriously undermines the Sentencing Reform Act's goal of 'avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.'" *Sims*, 174 F.3d at 912-13 (quoting 28 U.S.C. § 991(b)(1)(B)). The court was worried about disparity between rehabilitated defendants like Mr. Pepper and other offenders who may have rehabilitated after being sentenced but never will have a resentencing. See *Hasan*, 245 F.3d at 687-88. This concern is entirely misplaced.

As an initial matter, this argument misunderstands the kind of disparities that the federal sentencing laws seek to avoid. The statute asks sentencing courts to "consider" "unwarranted" disparities between "defendants with similar records." 18 U.S.C. § 3553(a)(6). Such disparities arise when different courts assign dramatically different values to indistinguishable aspects of defendants' records. The relevant "records" here are the records of offenders that are presented to courts in the sentencing process. The experiences of offenders that have not been put in front a court are not "records" that a sentencing judge can evaluate or consider. Invoking the experiences of such hypothetical offenders seeks to enforce an artificial kind of equality.[6]

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[6] The court's rhetoric draws heavily on the language of accident: a defendant who receives credit for his post-sentencing rehabilitation is said to be "lucky," the beneficiary of a "windfall" that

Simply put, an offender who is eligible for resentencing is not similarly situated to one who is not. Thus, as the D.C. Circuit has observed, "[d]istinguishing between prisoners whose convictions are reversed on appeal and all other prisoners hardly seems 'unwarranted.'" *Rhodes*, 145 F.3d at 1381. When a court considers a defendant's post-sentencing rehabilitation in a resentencing, it does not treat that defendant differently from any other defendant with a similar record. To the contrary, it treats that person like any other rehabilitated offender who comes before a court for sentencing.

In this respect, it is actually the Eighth Circuit's approach that leads to unfair disparity. Under the court's rule, sentencing judges can credit defendants for some acts of rehabilitation but must close their eyes to otherwise indistinguishable conduct merely because it happens later. Offenders with virtually identical records of post-offense rehabilitation thus are treated differently solely because one is being sentenced for the first time while the other is being resentenced. That makes no sense. Defendants who rehabilitate before their original sentencing are no more deserving of a lesser sentence than those whose rehabilitation comes later. Offenders like Mr. Pepper are not more likely to commit other crimes, more of a threat to society, or otherwise more in need of

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depends "on a fortuity." *Sims*, 174 F.3d at 912-13; see also *United States v. Hasan*, 205 F.3d 1072, 1078 (8th Cir. 2000) (Hansen, J., dissenting). That misses the point. As the D.C. Circuit has explained, "[a]ny disparity that might result from allowing the district court to consider post-conviction rehabilitation, however, flows not from [the defendant's] being 'lucky enough' to be resentenced, or from some 'random' event, but rather from the reversal" of his original conviction and/or sentence. *Rhodes*, 145 F.3d at 1381 (internal citation omitted).

punishment. Yet the Eighth Circuit's approach arbitrarily ensures that they receive harsher sentences. That is precisely the disparity that section 3553(a)(6) seeks to prevent.

As this case illustrates, such disparity is indefensible. The Eighth Circuit required the sentencing court to impose additional punishment on Mr. Pepper—and pretend that his exemplary conduct never happened—based on the supposed interests of a hypothetical group of other offenders. That misguided appeal to abstract "fairness" leads only to a uniform harshness of treatment; it is contrary to the imperative to treat defendants as ends rather than means, as individuals whose particular life experiences have consequence. It also leads to perverse results, singling out for harsh treatment precisely those people whose brush with the criminal process leads them to change their lives and become productive members of society. A just sentencing regime should find a way to benefit such offenders. It certainly should not go out of its way to blind itself to their efforts and undo their accomplishments.

III. The Eighth Circuit's Decision To Reassign This Case On Remand Resulted In Further Unwarranted Interference With The District Court's Discretion.

The second question presented asks whether a new judge assigned to a case on remand is required by law-of-the-case principles to follow the prior judge's sentencing findings. FAMM agrees with petitioner that the Eighth Circuit mangled the law-of-case doctrine. But something more is implicated. It would not have been necessary for the court of appeals to address the law-of-the-case issue but for its improper decision to take this case away from Judge

Bennett. The Eighth Circuit's unwarranted reassignment illustrates yet another way that a court may evade the limits on appellate review imposed by *Gall* and effectuate its own preferred sentencing outcomes despite this Court's admonitions.

A. Following the Eighth Circuit's first remand of this case for resentencing, Judge Bennett made comments that paralleled this Court's own observations about district judges' institutional superiority in determining the appropriate sentence, stating that he "just wish[ed] [the court of appeals] would give us more deference because I'm making the tough decisions based on the information that I have, my evaluation of the defendant who I've had a chance not only to sentence but resentence, to study very carefully the presentence report, to review very carefully . . . the recommendation of the probation officer." J.A. 148; cf. *Gall*, 552 U.S. at 51-52. Judge Bennett noted that the Eighth Circuit might reverse his sentencing determination, and while he acknowledged that he "w[ouldn't] like it" if the Eighth Circuit compelled him to impose a higher sentence on Mr. Pepper, he repeatedly stated that he would impose a sentence in accordance with any restrictions that the court of appeals imposed. J.A. 149 ("I won't like it, but I'll be happy to do it. . . . I'll impose it if they make me. . . . [I]f I have to do it, I have to do it.").

On appeal, the Eighth Circuit characterized Judge Bennett's comments as evincing a "reluctance to resentence Pepper again should this case be remanded" and used his statements as a basis for directing that the case be reassigned on remand. J.A. at 173. There were (and are) only two judges in regular active service in the Northern District of Iowa: Judge Bennett and Chief Judge Reade. Unsurpri-

singly, Judge Reade reassigned the case to herself. J.A. 174-76.

On resentencing, Judge Reade discarded Judge Bennett's ruling regarding the value of Pepper's substantial assistance, undertook a "de novo" review of the matter, and replaced Judge Bennett's assessment with her own, substantially lower, valuation. J.A. 201-09. She also denied all of Pepper's requests for downward variances and imposed a sentence nearly triple that imposed by Judge Bennett. J.A. 369-70. That new sentence, unlike the two sentences previously entered by Judge Bennett, was approved by the Eighth Circuit. J.A. 371-79.

B. The court of appeals' stated justification for directing that the case be reassigned was that Judge Bennett "expressed a reluctance to resentence Pepper again should this case be remanded." J.A. 173. That is belied by the record. Judge Bennett repeatedly confirmed that he would comply with the court of appeals' instructions in any future remand, even if such a remand were to require that he increase Pepper's sentence. J.A. 148-49. He acknowledged that he would not "like" to have to increase Pepper's sentence (*id.* at 149), but a district judge's personal disagreement with an appellate court's instructions provides no proper basis for reassigning the case. "[W]e accept the notion that the 'conscientious judge will, as far as possible, make himself aware of his biases [toward vindicating his prior conclusion], and, by that very self-knowledge, nullify their effect.'" *Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (2d Cir. 1943)); see also Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to*

Another District Judge, 120 F.R.D. 267, 283 (1988) ("The federal system assumes that district judges are capable of understanding and executing a mandate even when they disagree with it.").

Judge Bennett's frank acknowledgement of his distaste for imposing a higher sentence provided confirmation that he had sufficient "self-knowledge" to suppress his personal inclinations in any future remand—rather than, as the court of appeals concluded, justification for banishing him from a case he had been handling for four years. *Liteky*, 510 U.S. at 562 (Kennedy, J., concurring). The Eighth Circuit's reassignment of the case was thus plainly improper.

C. The impropriety of the reassignment is magnified here, because it opened the door to a further interference with the district court's discretion, Had the case not been reassigned, Judge Bennett's ruling regarding the value of Mr. Pepper's substantial assistance would have been undisturbed. As it was, however, the substitution of a new judge resulted in a substantially greater sentence, one that required Mr. Pepper to return to prison after years of living productively outside prison walls. In upholding this flouting of the law-of-the-case doctrine, the Eighth Circuit accomplished by indirection what this Court's rulings forbade it from doing directly.

The result was not only in tension with *Booker*, *Gall*, and *Kimbrough*, it undermines the systemic interests served by law-of-the case principles. "[T]he doctrine increases confidence in the adjudicatory process: reconsideration of previously litigated issues, absent strong justification, spawns inconsistency and threatens the reputation of the judicial system." *Ellis v. United States*, 313 F.3d 636, 647 (1st Cir. 2002) (citing Geoffrey C. Hazard, Jr., *Preclusion*

as to Issues of Law: The Legal System's Interest, 70 IOWA L. REV. 81, 88 (1984). Moreover, "judges who too liberally second-guess their co-equals effectively usurp the appellate function and embolden litigants to engage in judge-shopping and similar forms of arbitrage." *Ibid.* Such "judge-shopping" is no more appropriate when it comes from the unwarranted removal of a conscientious district judge who worked hard to fashion an appropriate sentence in an exceptional case. The replacement of Judge Bennett for doing nothing more than echoing this Court's message about the need for appellate deference to district court sentencing discretion was unnecessary and improper. This Court should not ignore the effect of the Eighth Circuit's maneuver on Mr. Pepper or on the federal sentencing process more broadly.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

JASON PEPPER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether a court of appeals may categorically prohibit sentencing courts from considering defendants' post-sentencing rehabilitation in determining appropriate sentences.

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, Federal Public and Community Defenders in the United States, have offices in 90 of the 94 federal judicial districts. *Amicus curiae*, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. *Amici curiae* represent tens of thousands of individuals in federal court each year, including those who are sentenced and those who are resentenced. The issue presented in this case and its broader implications are of great importance to our work and the welfare of our clients.

INTRODUCTION

As Petitioner demonstrates, the Eighth Circuit's blanket prohibition on consideration of evidence of post-sentencing rehabilitation conflicts with the instructions set forth in 18 U.S.C. § 3553(a), directly violates 18 U.S.C. § 3661, and is entirely inconsistent with the abuse-of-discretion standard of review. Pet'r Br. 29-35. Moreover, the reasons the Eighth Circuit has offered to justify its rule do not withstand scrutiny. Pet'r Br. 36-49. *Amici* offer further evidence that the Eighth Circuit's rule is wholly unsound in

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[1] The parties to the case, including the *amicus* appointed by the court to defend the judgment below, have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

light of empirical research, national experience, and a realistic assessment of the disparities it creates.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court excised § 3553(b)(1) and § 3742(e), and adopted an abuse-of-discretion standard called "reasonableness" review. The factors set forth in § 3553(a) now "guide sentencing" by the district courts, and "in turn will guide appellate courts . . . in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261. Before *Booker*, it was an abuse of discretion for a judge to consider a circumstance the Commission had forbidden as a ground for departure. *Koon v. United States*, 518 U.S. 81, 109 (1996). After *Booker*, it is an abuse of discretion to *fail* to consider such a circumstance when relevant under § 3553(a). *Gall v. United States*, 552 U.S. 38, 51 (2007).

Despite this Court's clear instructions, the Eighth Circuit has decreed that post-sentencing rehabilitation is "not relevant" under § 3553(a), thus transferring its prohibition on "departures" on that basis to variances. *See United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007) (citing *United States v. Sims*, 174 F.3d 911, 913 (8th Cir. 1999)); *United States v. Pepper*, 486 F.3d 408, 411, 413 (8th Cir. 2007) (*Pepper II*) (citing *Jenners*, 473 F.3d at 899, and *Sims*, 174 F.3d at 913); *United States v. Pepper*, 518 F.3d 949, 953 (8th Cir. 2008) (*Pepper III*) (citing *Jenners*, 473 F.3d at 899). According to the Eighth Circuit, *Gall* did not alter its precedent that "post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance." *Id.* at 953. In the Eighth Circuit, "'evidence of [a defendant's] post-sentence rehabilitation is not relevant and will not be permitted at resentencing.'" *United*

States v. Pepper, 570 F.3d 958, 965 (8th Cir. 2009) (*Pepper IV*)) (internal citations omitted).

The Eighth Circuit has partially nullified *Booker* by restoring § 3553(b)'s prohibition against basing sentences outside the guideline range on a ground forbidden by the Commission. *See* USSG § 5K2.19, p.s.; USSG App. C, amend. 602 (Nov. 1, 2000) (adopting *Sims* rule forbidding downward departures based on post-sentencing rehabilitation). The Eighth Circuit has thus assumed the power to do what the Sentencing Commission cannot do after *Booker*: issue mandatory policies categorically prohibiting consideration of relevant factors. The Eighth Circuit has deemed other factors to be "improper or irrelevant," without regard to § 3553(a), as well. *See, e.g.*, *United States v. Ross*, 487 F.3d 1120, 1124 (8th Cir. 2007) (defendant's religious awakening was an "improper or irrelevant factor"); *United States v. Blackford*, 469 F.3d 1218, 1220-21 (8th Cir. 2006) (disparity caused by government's refusal to agree to immunity pursuant to USSG § 1B1.8 was an "improper factor upon which to base a variance"); *United States v. Ture*, 450 F.3d 352, 359-60 (8th Cir. 2006) (consideration of defendant's obligation to pay back taxes, interest and penalties was "entirely improper").

This Court has rebuffed other attempts by the courts of appeals to deem certain considerations to be categorically "improper" or "impermissible." *See Gall*, 552 U.S. at 57-58; *Kimbrough v. United States*, 552 U.S. 85, 91 (2007). This Court should reject the Eighth Circuit's rule prohibiting consideration of evidence of post-sentencing rehabilitation as well.

SUMMARY OF ARGUMENT

I. This Court should reject the Eighth Circuit's rule prohibiting district court judges from considering evidence of post-sentencing rehabilitation under § 3553(a) because it replicates, by appellate court fiat, an erroneous course followed by the Sentencing Commission, but eventually corrected by this Court in *Booker*, *Rita v. United States*, 551 U.S. 338 (2007), and *Gall*. That course was the elimination from judicial consideration of a defendant's personal characteristics, and thus of most of the mitigating factors that might apply in individual cases and that bear directly on the purposes of sentencing.

Prior to the Guidelines, the defendant's personal characteristics were among the most important considerations in sentencing. Courts understood that the defendant's history and characteristics were highly relevant to achieving rehabilitation, thus restoring the defendant to useful citizenship without risk to the public. The punishment fit the offender and not just the crime. But the Commission constructed the Guidelines almost solely of aggravating factors, and prohibited or discouraged mitigating offender characteristics as grounds for departure. This course was flawed, as shown by the Commission's empirical research and that of others. That research demonstrates that the offender's history and characteristics are highly relevant to the purposes of sentencing and may provide compelling grounds for mitigation.

In Jason Pepper's case, as in others, rehabilitation is a collection of personal characteristics and accomplishments that show a strongly diminished likelihood of recidivism and the ability to live a law-abiding life. According to the empirical research, a defendant

like Pepper – who has abstained from drugs, attended college, held a steady job, established strong family ties, and taken on family responsibilities – does not require lengthy imprisonment to accomplish specific deterrence, protection of the public, or rehabilitation in the most effective manner.

II. While the Eighth Circuit's rule is based primarily on the claim that it prevents "disparity," this rationale does not bear scrutiny. The Eighth Circuit's refusal to permit consideration of post-sentencing rehabilitation while permitting consideration of pre-sentencing rehabilitation is logically flawed and creates disparities that cannot be justified by the purposes of sentencing. The Eighth Circuit's prohibition against consideration of post-sentencing rehabilitation prevents no unwarranted disparity and grossly distorts the concept of fairness to mean uniform, unwarranted, harshness.

It is thus clear that, even if the Eighth Circuit's rule did not flout the governing statutes and this Court's rulings in *Booker*, *Rita* and *Gall*, it would be insupportable.

ARGUMENT

I. THIS COURT SHOULD REJECT THE EIGHTH CIRCUIT'S RULE BECAUSE IT REPLICATES THE SENTENCING COMMISSION'S ERRONEOUS EXCLUSION OF MITIGATING OFFENDER CHARACTERISTICS FROM CONSIDERATION IN SENTENCING.

The Eighth Circuit's ruling is a continuation, by appellate court fiat rather than regulation, of an erroneous course followed by the Sentencing Commission that was eventually corrected by this

Court's decisions in *Booker*, *Rita* and *Gall*. That course was the elimination from judicial consideration of a defendant's personal characteristics, and thus of most of the mitigating factors that might apply in individual cases. This Court corrected that course in *Booker* by making § 3553(a) the governing provision and reinstating a defendant's personal "history and characteristics" as a principal factor that sentencing courts must consider. It further clarified in *Rita* that sentencing judges need not adhere to Guideline provisions that do not treat offender characteristics properly under § 3553(a). *Rita*, 551 U.S. at 357. And if there were any remaining doubt, this Court dispelled it in *Gall* by upholding a variance based on a number of factors disfavored by the Guidelines' policy statements. *Gall*, 552 U.S. at 53-60.

But the Eighth Circuit's rule against consideration of post-sentencing rehabilitation mimics the pre-*Booker* regime in which certain mitigating characteristics could not be considered. Its decision in this case, declaring Pepper's personal history and characteristics to be "not relevant," is entirely inconsistent with the governing statutes and this Court's decisions, as argued persuasively by Petitioner. Pet'r Br. 22-35. Moreover, the Eighth Circuit's rule creates an absurd disjunction. Judges are free to ignore or reject a Guidelines policy statement prohibiting or disfavoring departure because it fails to treat the defendant's characteristics in the proper way, *Rita*, 551 U.S. at 357, or because it is simply not "pertinent," *Kimbrough*, 552 U.S. at 101 (quoting § 3553(a)(5)). But judges in the Eighth Circuit must comply with an absolute appellate bar against consideration of post-sentencing rehabilitation. The courts of appeals should not be permitted to replicate

the mandatory Guidelines' removal of relevant factors from consideration.

Accordingly, the Court should reject the Eighth Circuit's rule.

A. Prior To The Sentencing Reform Act, The Defendant's Personal Characteristics Were Among The Most Important Considerations In Sentencing.

Before the Guidelines, sentencing judges routinely considered defendants' personal history and characteristics. As this Court recognized in *Williams v. New York*, 337 U.S. 241 (1949), the "fullest information possible concerning the defendant's life and characteristics" was "[h]ighly relevant – if not essential" to sentencing, because "the punishment should fit the offender and not merely the crime." *Id.* at 247. The Court reiterated this principle in *North Carolina v. Pearce*, 395 U.S. 711 (1969), recognizing that a judge may impose "a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Id.* at 723 (internal citations omitted).

The reason for consideration of facts about the offender, such as his family life, employment history, and mental health, during this period was the understanding that this information was directly relevant to the most appropriate sentence in a system that emphasized rehabilitation with the goal of restoring the offender to "complete freedom and useful citizenship" without risk to the public. *Williams*, 337 U.S. at 249; *see* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in*

Modern Sentencing Reforms, 58 Stan. L. Rev. 277, 278-79, 289 (2005) (noting that offender characteristics in a system organized by rehabilitative goals are viewed as a central consideration "when seeking to predict and prevent future criminal behavior").

B. The Original Commission's Decision To Omit Offender Characteristics From The Guidelines Was Intended To Be Provisional.

When Congress enacted the Sentencing Reform Act of 1984, it recognized that rehabilitation was an important purpose of punishment, along with just punishment, deterrence, and incapacitation. 18 U.S.C. § 3553(a)(2).[2] Congress encouraged the Commission to include all relevant offender characteristics in the Guidelines. 28 U.S.C. § 994(d). It specifically directed the Commission to consider age, education, vocational skills, mental and emotional condition, physical condition, drug dependence, employment record, family ties and responsibilities, community ties, and criminal history. *Id.* The Commission was to "explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise." S. Rep. No. 98-225, at 175 (1983). Under significant time constraints[3] and with differing inter-

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[2] Congress, moreover, believed that imprisonment was not an effective means of accomplishing rehabilitation. *See* 18 U.S.C. § 3582(a); 28 U.S.C. § 994(k).

[3] Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 858 (1992).

nal viewpoints, the original Commission did not include all "the offender characteristics which Congress suggested that [it] should,"[4] but instead "compromised" by promulgating offender characteristic rules that "look primarily to past record of convictions" to increase punishment.[5] All other offender characteristics were left out of the guidelines.[6] Only two mitigating factors were included in the guidelines, role in the offense, USSG § 3B1.2, and acceptance of responsibility, USSG § 3E1.1.[7]

As then-Judge and Commissioner Breyer recognized, the original Commission's policy regarding offender characteristics "deviated from average past practice," in which judges considered a wide variety of mitigating factors.[8] Justice Breyer later explained that the decision to leave offender characteristics other than criminal history out of the guidelines stemmed from "the difficulty of determining *which* other characteristics should be used."[9] It may also have been due to the difficulty of listing, describing, and assigning numerical values to such factors in

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[4] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 & n.98 (1988) (citing 28 U.S.C. §§ 994(d) & 994(k)).

[5] *Id.* & n.96.

[6] Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. Rep. 180, 1999 WL 730985, at *5 (Jan./Feb. 1999).

[7] Use of the term "guidelines" here refers to formal guideline rules promulgated pursuant to 28 U.S.C. § 994(a)(1), as distinct from policy statements.

[8] Breyer, *Key Compromises*, *supra* note 4, at 18-19.

[9] Breyer, *Guidelines Revisited*, *supra* note 6, at *5 (emphasis in original).

the abstract.[10] Whatever the reason, the decision was "intended to be provisional and [] subject to revision in light of Guideline implementation and experience."[11]

In the meantime, judges were to depart whenever they found that a mitigating factor covered by the broad terms of § 3553(a)(1) existed in the case that was not adequately reflected (in kind or degree) in the applicable "guidelines," which should result in a different sentence in light of the purposes of sentencing set forth in § 3553(a)(2). *See* U.S.C. § 3553(b) (as enacted by Pub. L. No. 98-473, § 212(a) (Oct. 12, 1984)). "[T]he very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures," the "courts of appeals, and the Sentencing Commission, will examine, and learn from, those reasons," and "the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves." *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, C.J.); *see also Rita*, 551 U.S. at 358. The Commission would not "second-guess[] individual judicial sentencing actions either at the trial or appellate level," but instead would learn "whether the guidelines are being effectively

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[10] *See* USSG Ch. 1, Pt. A(4)(b); USSG § 5K2.0, p.s., comment. (backg'd); U.S. Sent'g Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3 (2003); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 70-71 (2003) (Commission "preferred objective factors, such as drug weight or dollar amount, to subjective ones").

[11] Breyer, *Guidelines Revisited*, *supra* note 6, at *5.

implemented and revise them if for some reason they fail to achieve their purposes."[12] In this way, the Guidelines would "reflect current views as to just punishment, and take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation."[13]

C. The Commission Prohibited Or Strongly Discouraged Consideration Of Most Mitigating Factors As Grounds For Departure.

The first set of Guidelines, through policy statements, deemed age, educational and vocational skills, mental or emotional conditions, physical condition, employment record, family ties and responsibilities, and community ties to be "not ordinarily relevant" as grounds for departure. USSG §§ 5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, p.s. (Nov. 1, 1987). Drug dependence, alcohol abuse, personal financial difficulties, and economic pressures on a trade or business were prohibited grounds. USSG §§ 5H1.4, 5K2.12, p.s. (Nov. 1, 1987). The guidelines were thus constructed mostly of aggravating factors, while mitigating offender characteristics were deemed to be not ordinarily or never relevant for purposes of departure.

Over the ensuing years, no mitigating offender characteristics were added to the guidelines,[14] but

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[12] S. Rep. No. 98-225, at 178 (1983).

[13] *Id.*

[14] A handful of mitigating offense circumstances were added to the guidelines. *See* USSG §§ 2D1.1(b)(11) (two-level decrease if defendant meets safety valve criteria), 2D1.8(a)(2) (four-level decrease based on role in the offense), 2D1.11(a) (decreases if defendant receives mitigating role adjustment), 2L1.1(b)(1)

further limitations on departure were added. While courts of appeals were to uphold reasonable departures, they strictly enforced policy statements restricting departures.[15] This combination of restrictive policy statements and strict appellate review effectively eliminated most mitigating factors from consideration.

When courts sought to recognize mitigating factors not already prohibited or discouraged by the policy statements, the Commission acted to curtail them. For example, when the Second Circuit upheld a departure based on the defendant's "diminutive size and immature appearance," after he had been sexually victimized and placed in solitary confinement for his protection,[16] the Commission issued a revised policy statement asserting that physical "appearance, including physique," is not ordinarily relevant in deciding whether to depart.[17] Similarly,

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(three-level decrease if alien smuggling offense involved only defendant's spouse or child), 2L2.1(b)(1) (same for immigration document offense).

[15] Courts of appeals were to reverse only "unreasonable" departures, 18 U.S.C. § 3742(e)(3), (f)(2) (2000), but were to reverse incorrect applications of the Guidelines, *id.* § 3742(e)(2), (f)(1). Policy statements were strictly enforced according to the latter provisions even before *de novo* review was added by the PROTECT Act. *See Williams v. United States*, 503 U.S. 193, 200 (1992); *see also* Hofer & Allenbaugh, *supra* note 10, at 83-84; Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. L. Rev. 1441, 1468-70 (1997).

[16] *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990).

[17] USSG § 5H1.4, p.s.; USSG App. C, amend. 386 (Nov. 1, 1991). The Commission explained that the amendment expressed its position regarding "depart[ures] based upon the defendant's alleged vulnerability to sexual assault in prison due to youthful

in response to a Ninth Circuit holding that a disadvantaged childhood could justify downward departure in some circumstances, the Commission issued a policy statement asserting that a defendant's "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing" are "not relevant" grounds for departure.[18] The Commission gave no official reason for this amendment, but members of the Commission at the time explained that the Commission was concerned that such a departure could "potentially be applied to an extremely large number of cases."[19] Thus, although the Commission recognized the manifest relationship between childhood disadvantage and crime, it prohibited courts from recognizing any distinction relevant to sentencing purposes between defendants raised in privilege and those raised in poverty and neglect. Military, civic, charitable and public service, employment-related contributions, and prior good works were all likewise deemed not ordinarily relevant[20] "in response to court decisions."[21]

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appearance and slender physique." 56 Fed. Reg. 1846, 1887 (Jan. 17, 1991).

[18] USSG § 5H1.12, p.s.; USSG App. C, amend. 466 (Nov. 1, 1992); *see* William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 84 (1993) (citing *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), *overruled on other grounds*, 990 F.2d 501 (9th Cir. 1993) (en banc)).

[19] Wilkins & Steer, *supra* note 18, at 84-85.

[20] USSG § 5H1.11, p.s.; USSG App. C, amend. 386 (Nov. 1. 1991).

[21] U.S. Sent'g Comm'n, Simplification Draft Paper, *Departures and Offender Characteristics*, Part II(B)(3), *available at* http://www.ussc.gov/SIMPLE/depart.htm.

The Commission similarly adopted the Eighth Circuit's minority view regarding post-sentencing rehabilitation, without apparent consideration of the decisions of the seven courts of appeals that had held that post-sentencing rehabilitation was an appropriate basis for downward departure. Adopting the Eighth Circuit's decision in *Sims*, the Commission prohibited downward departure for "[p]ost-sentencing rehabilitative efforts, even if exceptional." USSG § 5K2.19, p.s.; USSG App. C, amend. 602 (Nov. 1, 2000). In contrast, the seven other circuits found, in carefully-reasoned opinions, that post-sentencing rehabilitation is relevant to the purposes of sentencing, *see United States v. Core*, 125 F.3d 74, 78 (2d Cir. 1997); *United States v. Rhodes*, 145 F.3d 1375, 1381-82 (D.C. Cir. 1998); *United States v. Green*, 152 F.3d 1202, 1208 (9th Cir. 1998); *United States v. Rudolph*, 190 F.3d 720, 724 (6th Cir. 1999); that there is no unwarranted disparity between defendants who are resentenced after an appeal and defendants who are not, *see Core*, 125 F.3d at 77; *Rhodes*, 145 F.3d at 1378, 1381; *Green*, 152 F.3d at 1207 & n.6, 1208; *Rudolph*, 190 F.3d at 724; *United States v. Bradstreet*, 207 F.3d 76, 82 & n.6 (1st Cir. 2000); that there is no reasonable basis for treating post-offense rehabilitation and post-sentencing rehabilitation differently, *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997); *Core*, 125 F.3d at 77; *Green*, 152 F.3d at 1207; *United States v. Roberts*, 1999 WL 13073, at *6 & n.1 (10th Cir. Jan. 14, 1999) (unpublished); *Rudolph*, 190 F.3d at 723; and that a judge's consideration of post-offense rehabilitation in no way interferes with the Bureau of

Prisons' award of good time credits for compliance with disciplinary regulations, *Core*, 125 F.3d at 78; *Rhodes*, 145 F.3d at 1379-80; *Rudolph*, 190 F.3d at 725; *Bradstreet*, 207 F.3d at 83. While the Commission cited most of these cases, it did not mention or address their reasoning, adopting instead the flawed reasons given in *Sims*. *See* Pet'r Br. 36-49.

The Commission subsequently eliminated or limited additional mitigating factors in response to the PROTECT Act's directive to "ensure that the incidence of downward departures are substantially reduced." Pub. L. No. 108-21, § 401(m)(2)(A) (2003).[22] Later, it came to light that Congress had been mistaken in its belief, underlying the PROTECT Act, that this Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), had caused an increase in judicial leniency.[23]

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[22] The Commission issued policy statements prohibiting departures based on gambling addiction, USSG § 5H1.4, p.s.; role in the offense, USSG § 5H1.7, p.s.; acceptance of responsibility, USSG § 5K2.0(d)(2), p.s.; decision to plead guilty or enter into a plea agreement, USSG § 5K2.0(d)(4), p.s.; and fulfillment of restitution obligations to the extent required by law, USSG § 5K2.0(d)(5), p.s.; and limiting departure from the "career offender" guideline to one criminal history category, USSG § 4A1.3(b)(3)(A), p.s. *See generally* USSG App. C, amend. 651 (Oct. 27, 2003).

[23] Subsequent to the PROTECT Act, the Commission reported that *Koon* had had no noticeable impact on the rate of departures. *See* U.S. Sent'g Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 54-56 (2003). The increase in departures was instead due to an increase in government-sponsored departures, primarily to facilitate swift processing of a large number of immigration cases on the southwest border. Until 2003, the Commission had included these government-sponsored departures in the "other downward departure" rate. The Commission reported that at

D. The Commission's Own Research And That Of Others Demonstrates That This Course Was Flawed Because Offender Characteristics Are Indeed Relevant To The Purposes Of Sentencing.

The Commission's policy statements prevented consideration of several factors, as too "ordinary," that research shows to be highly significant with respect to the likelihood of recidivism. These factors thus are closely related to the need to afford "adequate deterrence," the need "to protect the public" from further crimes of the defendant, and the need to provide treatment and training in the "most effective manner." 18 U.S.C. § 3553(a)(2)(B), (C), (D). For example, the Commission's research shows that offenders who are or have been steadily employed are less likely to recidivate than those who are unemployed, that offenders with more education are less likely to recidivate than those with less education, and that those who abstain from illicit drug use are less likely to recidivate than those who use drugs.[24] A significant Bureau of Prisons study also found that "[s]table employment or student status . . . prior to confinement is strongly related to a lower likelihood of recidivating."[25] Offenders who found employment

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least 40% of these "other downward departures" were sought by the government. *Id.* at 60.

[24] U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & Ex. 10 (2004).

[25] Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 54 (Aug. 4, 1994), *available at* http://www.

after their release recidivated at about half the rate of those who did not.[26]

The Commission's research shows that offenders who are or have ever been married are less likely to recidivate than those who have never been married,[27] and that offenders with financial dependents are less likely to recidivate than those without dependents.[28] Other empirical research has concluded that the "ability to sustain marriage may predict abstinence from crime," that attachment to a spouse as a young adult is "associated with a significant and substantial reduction in adult antisocial behavior," that offenders who maintain an interest in their families are more likely to be successful when released, and that male offenders who cease to commit crimes often do so in conjunction with the establishment of a sound relationship with a woman.[29] The Bureau of Prisons study similarly found that the recidivism rate among offenders who live with a spouse after release is less

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bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf.

[26] *Id.* at 4-5.

[27] *Measuring Recidivism*, *supra* note 24, at 12-13 & Ex. 10.

[28] U.S. Sent'g Comm'n, *Recidivism and the "First Offender"* 8 (2004).

[29] *See* Correctional Service Canada, *Does Getting Married Reduce the Likelihood of Criminality*, Forum on Corrections Research, Vol. 7, No. 2 (May 2005) (citing Robert J. Sampson & John H. Laub, *Crime and Deviance Over Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609 (1990)); Robert J. Sampson, John H. Laub, & Christopher Winer, *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 Criminology 465, 497-500 (2006) (finding that "being married is associated with a significant reduction in the probability of crime").

than half that of those who have other living arrangements.[30] "The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures."[31]

Conversely, particularly for offenders with a low risk of recidivism, lengthy imprisonment can increase the risk of recidivism by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders.[32]

A host of studies show the efficacy of drug treatment as an alternative to incarceration and as a method of reducing crime.[33] According to the

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[30] *See* Harer, *Recidivism*, *supra* note 25, at 5-6.

[31] Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002).

[32] *See* Lynne M. Vieraitis *et al.*, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, at 6 Criminology & Pub. Pol'y 589, 591-93 (2007) (stating that "imprisonment causes harm to prisoners," isolating them from families and friends, making it difficult to successfully reenter society, and "reinforc[ing] criminal identities" through contacts with other criminals); U.S. Sent'g Comm'n, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 18-19 (Nov. 1996) (imprisonment has criminogenic effects including "contact with more serious offenders, disruption of legal employment, and weakening of family ties"), *available at* http://www.ussc.gov/SIMPLE/sentopt.htm; Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22 (1994) ("[T]he alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment may well increase recidivism.").

[33] *See, e.g.*, Susan L. Ettner *et al.*, *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, 41 Health Services Res. 192-213

National Institute on Drug Abuse, "Effective treatment decreases future drug use and drug-related criminal behavior, can improve the individual's relationships with his or her family, and may improve prospects for employment."[34] Studies and experience have shown that recidivism is reduced by therapeutic mental health court programs designed to treat mental disorders as an alternative to longer prison sentences,[35] post-offense educational and vocational training[36] and "problem-solving" courts in the federal system that include educational and vocational training as a condition of supervised release.[37]

(2006); Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, Justice Policy Institute Policy Report, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* 5-6, 18 (2004).

[34] Nat'l Inst. on Drug Abuse, Nat'l Insts. of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide* 12 (2007).

[35] *See* Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 16 Am. J. Psychiatry 1395-1403 (2007); Ohio Office of Criminal Justice Services, *Research Briefing 7: Recidivism of Successful Mental Health Court Participants* (2007), *available at* http://www.publicsafety.ohio.gov/links/ocjs_researchbriefing7.pdf.

[36] *See* Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* 9, Ex. 4 (2006) (comprehensive review of programs with demonstrated effect on reducing recidivism, including prison- and community-based educational programs), *available at* www.wsipp.wa.gov/rptfiles/06-10-1201.pdf.

[37] *See* U.S. Sent'g Comm'n, *Symposium on Alternatives to Incarceration* 22-24 (2008) (testimony of Chief Probation Officer Doug Burris, E.D. Mo.) (reporting that district's employment program has resulted in a 33% reduction in recidivism rates);

The Commission's research shows that the likelihood of recidivism declines with age.[38] Other research shows that the young are less culpable than the average offender,[39] and have a high likelihood of reforming in a short period of time.[40] Prison can be especially harmful to young and youthful-looking offenders, who are at particular risk of rape and other violence by other prisoners and staff.[41] A

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see also id. at 238-39 (testimony of Judge Jackson, E.D. Mo.) (reporting district's revocation rate as "lower than the circuit and the national rates"), *available at* http://www.ussc.gov/SYMPO2008/NSATI_0.htm.

[38] *Measuring Recidivism*, *supra* note 24, at 12 & Ex. 9.

[39] *See, e.g.*, Federal Advisory Committee on Juvenile Justice, U.S. Dep't of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report* 8 (2005), *available at* www.ncjrs.gov/pdffiles1/ojjdp/212757.pdf; Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Science 105-09 (2004); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preferences and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psych. 625, 632 (2005).

[40] *See, e.g.*, Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011-14 (2003); Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinq. 396 (1993).

[41] *See* Allen J. Beck *et al.*, Bureau of Justice Statistics Special Report, *Sexual Violence Reported by Correctional Authorities, 2006*, at 4 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf; Kevin N. Wright, *The Violent and Victimized in Male Prison*, 16 J. Offender Rehab. 1, 6, 22 (1991); David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 Stan. L. Rev. 1541, 1545 (1992); U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Juveniles in*

"particularly strong indicator of whether a prisoner will be victimized is his physical build."[42]

Not surprisingly, most judges report that offender characteristics that are prohibited, discouraged or limited by the Commission's policy statements, including post-sentencing rehabilitation, are in fact "ordinarily relevant" to their determination of the appropriate sentence.[43] The Commission recently issued minor changes to some of its policy statements regarding offender characteristics, but continues to find it difficult to meaningfully change its approach to departures on those grounds.[44] The Commission is,

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Adult Prisons and Jails: A National Assessment 7-8 (2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/ 182503.pdf.

[42] *See* Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. Crim. L. & Criminology 127, 167 (2002); *see also* David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 Stan. L. Rev. 1541, 1545 (1992) ("Rape in prison occurs brutally and inevitably . . . [o]ften, the younger, smaller, or less streetwise inmates are the victims.").

[43] U.S. Sent'g Comm'n, *Results of Survey of United States District Judges January 2010 through March 2010*, table 13, *available at* http://www.ussc.gov/Judge_Survey/2010/Judge Survey_201006.pdf.

[44] The Commission amended the Introductory Commentary to Chapter 5, Part H (Specific Offender Characteristics) to admonish judges not to give offender characteristics "excessive weight" and that their "most appropriate use" is "not as a reason to sentence outside the applicable guideline range," but to determine the sentence within the guideline range. *See* 75 Fed. Reg. 27,388, 27,389-91 (May 14, 2010). Age, mental and emotional conditions, physical condition, and military service, formerly deemed "not ordinarily relevant" for purposes of departure, now "may be relevant" to departure. The standard

however, beginning to review and revise certain guidelines in response to variance rates.[45] *See Booker*, 543 U.S. at 264 (describing Commission's continuing function to revise the advisory guidelines in response to "actual district court sentencing decisions"); *see also Rita*, 551 U.S. at 350; *Kimbrough*, 552 U.S. at 107.

E. Contrary To The Eighth Circuit's View, Post-Sentencing Rehabilitation Is Relevant To Sentencing Under § 3553(a).

The Eighth Circuit's ruling that the evidence of Jason Pepper's post-sentencing rehabilitation is "not relevant" to the appropriate sentence is wrong. In Pepper's case, as in others, rehabilitation is a collection of personal characteristics and accomplishments that show a strongly diminished likelihood of recidivism and the ability to lead a law-abiding life. According to the research cited above, a defendant like Pepper who has abstained from drugs, attended

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for factors that "may be relevant," however, is the same as that for factors deemed "not ordinarily relevant" before the PROTECT Act. *Compare id. with* USSG § 5K2.0 (2002). Drug dependence, formerly "not relevant," is now "not ordinarily relevant." 75 Fed. Reg. at 27,390. A need for substance abuse or mental health treatment may be a reason for a limited downward departure, but only for a small number of defendants with low offense levels, most of whom are not in need of treatment. *Id.* at 27,388, 27,390-91; U.S. Sent'g Comm'n, Transcript of Public Hearing 27-31 (Mar. 17, 2010).

[45] *See* 75 Fed. Reg. 27,388, 27,393 (May 14, 2010) (eliminating "recency" points from the criminal history score "in part because criminal history issues are often cited by sentencing courts as reasons for imposing non-government sponsored below range sentences, particularly in cases in which recency points were added to the criminal history score under §4A1.1(e)").

college, held a steady job, established strong family ties, and taken on family responsibilities presents a very low risk of recidivism. *See* J.A. 94-95, 104-12, 116-21, 301-04, 320-21, 323-29. "[R]ather than being a gamble on the prospective efficacy of rehabilitative methods," a variance for post-sentencing rehabilitation "recognizes the empirical success of a specific defendant's attempts at rehabilitation." [46] *Rudolph*, 190 F.3d at 724. The district court should have been allowed to consider these facts about Pepper.

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[46] Other factors present in Pepper's case, apart from his rehabilitative efforts, also indicate a low likelihood of recidivism, which the guidelines do not take into account. Offenders with zero criminal history points are far less likely to recidivate than offenders with even one criminal history point. *Measuring Recidivism*, *supra* note 24, at 7. Non-violent offenders, including drug offenders, are less likely to recidivate than violent offenders. *Id.* at 13 & Ex. 11. Contrary to the Eighth Circuit's belief, *Pepper*, 486 F.3d at 412-13, lack of violence is not accounted for in the criminal history score. *See* U.S. Sent'g Comm'n, *Final Report of the Impact of* United States v. Booker *on Federal Sentencing* 105 (2006).

II. THIS COURT SHOULD REJECT THE EIGHTH CIRCUIT'S RULE BECAUSE IT CREATES UNJUSTIFIED DISPARITIES, PREVENTS NO UNWARRANTED DISPARITIES, AND IS BASED ON A DISTORTED CONCEPT OF FAIRNESS TO MEAN UNIFORM HARSHNESS.

A. There Is No Reasonable Basis For Treating Post-Sentencing Rehabilitation Differently From Pre-Sentencing Rehabilitation, And Doing So Results In Unwarranted Disparities.

The Eighth Circuit's differential treatment of pre- and post-sentencing rehabilitation is illogical and unfair. Indeed, while purporting to prevent unwarranted disparities, the Eighth Circuit has actually created disparities that cannot be justified by the purposes of sentencing.

The arbitrariness of the Eighth Circuit's distinction between pre- and post-sentencing rehabilitation is revealed by a comparison of this case with other Eighth Circuit cases. Pepper immediately cooperated with law enforcement and was relieved to get away from methamphetamine. While detained before sentencing, he re-established his relationship with his father. At sentencing, he asked to be placed in a prison drug treatment program rather than boot camp, even though it would mean more time served in prison. J.A. 39-41. Such facts are relevant under § 3553(a) and provide a valid basis for a variance. *See United States v. Lazenby*, 439 F.3d 928, 930-32 (8th Cir. 2006) (recognizing as appropriate grounds for variance that defendant reunited with her son and refrained from using drugs). Pepper then served his 24-month sentence, during which he completed

the drug treatment program he requested. Thereafter, over the course of nearly four years, he built a law-abiding life, attending school full time, excelling in his job, getting married, parenting and supporting his wife's daughter, and remaining drug-free. J.A. 94-95, 104-12, 116-21, 124-31, 133-34, 143-50, 301-05, 320-21, 323-29. The Eighth Circuit said it was "improper" to consider this evidence, but it upheld a variance in another case where the defendant, *while on pretrial release*, stopped using drugs, put himself through community college, was a model employee, and passed all drug tests. *See United States v. McMannus*, 262 Fed. App'x 732 (8th Cir. 2008). Thus, if Pepper had been able to accomplish what he did *before* his original sentencing, the Eighth Circuit would have upheld a variance on that basis. The reason Pepper could not do so was that, unlike McMannus, he was detained before his original sentencing.

Pepper and McMannus both pled guilty to trafficking in methamphetamine. Pepper was detained and McMannus was released. Defendants like McMannus who are released before trial can and do participate in rehabilitative programs, such as educational and vocational programs, substance abuse treatment, and mental health treatment, usually by court order as conditions of release and facilitated by the Office of Probation and Pretrial Services.[47] But

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[47] *See* Office of Probation and Pretrial Services, *Monograph 110, Judicial Officer's Reference on Alternatives to Detention and Conditions of Release* (April 2009) (encouraging judges to consider alternatives to detention whenever appropriate and setting forth the relevant considerations); Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts: 2009 Annual Report of the Director*, table S-14 (showing that nearly a third of defendants in pretrial services with substance

defendants who, like Pepper, are detained, rarely if ever have access to rehabilitative programs, as the primary focus of pretrial detention is "necessarily detainee processing, movement, and management."[48] *See United States v. Perella*, 273 F. Supp. 2d 162, 166 (D. Mass. 2003) ("Offenders with drug problems are typically referred to drug programs either as a condition of pretrial release, or after sentencing," but "[t]here are few if any programs available . . . to prisoners detained prior to trial."). The different circumstances of defendants in these two situations do not justify a profound distinction in their treatment in sentencing.

The Eighth Circuit's distinction also disadvantages defendants charged with "blue collar" crimes as compared to those charged with "white collar" crimes. Most defendants charged with drug trafficking are detained because, under the Bail Reform Act, they are subject to a rebuttable presumption of detention before conviction, 18 U.S.C. § 3142(e)(3)(A), (g)(1), and must be detained after conviction and before

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abuse conditions receive judiciary-funded substance abuse treatment), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2009.aspx; *id.* table H-8 (showing number of pretrial defendants released with a condition of mental health treatment).

[48] *See* U.S. Dep't of Justice, Office of Federal Detention Trustee, *Detention Needs Assessment and Baseline Report* 4 (2002) ("Detention is comparatively temporary in nature and involves the constant movement of detainees in and out of facilities. Detainee self-improvement programs (e.g., education, vocational training, drug treatment, work programs, etc.) are rare because detention is typically short-term."), *available at* http://www.justice.gov/ofdt/federal_detention_report_2002.pdf.

sentencing except in the rarest of circumstances.[49] In contrast, defendants charged with white collar offenses are not subject to a presumption of detention and must ordinarily be released. 18 U.S.C. § 3142(a)-(c).

Finally, the Eighth Circuit's rule against post-sentencing rehabilitation is irrational in view of the fact that there is no prohibition against granting a reduced sentence at an original sentencing to facilitate prospective rehabilitation after sentencing. Indeed, under the Guidelines, a judge may grant a small departure to enable certain defendants to accomplish a specific treatment objective, after consideration of "the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant." *See* USSG § 5C1.1, comment. (n.6) (2009); 75 Fed. Reg. 27,388, 27,388 (May 14, 2010). If it is acceptable to impose a reduced sentence based on a *prediction* of success after sentencing, surely it must be acceptable to recognize *actual* success for a period of time after sentencing. It is particularly irrational to forbid a court from considering post-sentencing rehabilitation where, as here, the defendant has proved that his rehabilitation is real and permanent.

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[49] Detention after conviction and before sentencing is mandatory unless there is a substantial likelihood that a motion for acquittal or new trial will be granted, or the government recommends that no sentence of imprisonment be imposed. 18 U.S.C. § 3143(a)(2)(A)(i), (ii). The latter exception is not possible in most drug trafficking cases since a term of imprisonment is required for a Class A or B felony. *See* 18 U.S.C. § 3559(a); 18 U.S.C. § 3561(a); 21 U.S.C. § 841(b).

B. The Eighth Circuit's Prohibition Is Based On A Gross Distortion Of The Concept Of Fairness And Does Not Prevent Any Unwarranted Disparity.

The Eighth Circuit and the Commission, invoking the "battle cry of disparity,"[50] have adopted a rule of uniform harshness that turns fairness on its head. To force a judge, whose duty is to sentence the defendant before him as an individual, *Gall*, 552 U.S. at 50, 52; *Rita*, 551 U.S. at 357-58, to turn a blind eye to that individual's relevant mitigating characteristics because of abstract concerns about hypothetical defendants is a gross distortion of fairness. It ensures harshness for all, but helps no one – not the defendant before the court, not the hypothetical defendant who is not before the court, and not society at large. Conversely, consideration of post-sentencing rehabilitation assures the defendant before the court that he has been treated fairly. *See Rita*, 551 U.S. at 367 (Stevens, J., joined by Ginsburg, J., concurring) ("If the defendant is convinced that justice has been done in his case – that society has dealt with him fairly – the likelihood of his successful rehabilitation will surely be enhanced."). It furthers society's utilitarian goals, and it harms no one. Prison time is not a zero-sum game where less time for one means more time for another or vice versa.

Petitioner persuasively establishes that differences in sentencing outcomes resulting from the ordinary operation of the criminal justice system do not create *unwarranted* disparities. Pet'r Br. 45-46. The ordinary operating principle here is that sentencing

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[50] Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 104-42 (1998).

courts may and should consider the facts as they exist at the time of a resentencing, including facts that came into existence after a previous sentencing. *Id.* at 41-44. For this reason alone, there *is* no unwarranted disparity between defendants whose cases are appealed and remanded for resentencing and defendants who are sentenced only once. *See Bradstreet*, 207 F.3d at 82 & n.6; *Rudolph*, 190 F.3d at 724; *Green*, 152 F.3d at 1207 n.6, 1208; *Rhodes*, 145 F.3d at 1378, 1381; *Core*, 125 F.3d at 77. Defendants whose cases are appealed and remanded for resentencing and defendants who are sentenced only once are simply not similarly situated.

The Eighth Circuit, however, created a different operating principle unique to post-sentencing rehabilitation, *i.e.*, good conduct. It held that evidence that arises after an original sentencing may not be considered at a resentencing, and thus evidence of post-sentencing rehabilitation is "not relevant." *See Pepper*, 570 F.3d at 965; *Sims*, 174 F.3d at 913. In contrast, the Eighth Circuit held that a defendant's bad conduct that occurred after the original sentencing may be considered at resentencing. *United States v. Stapleton*, 316 F.3d 754, 757 (8th Cir. 2003). The Eighth Circuit's prohibition against post-sentencing rehabilitation is thus an arbitrary one-way ratchet based on a legal principle that does not in fact exist.[51]

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[51] The one reason the Sentencing Commission gave for its policy statement banning downward departures based on post-sentencing rehabilitative efforts, in addition to the reasons given by the Eighth Circuit in *Sims*, was that it "is consistent with Commission policies expressed in § 1B1.10." USSG App. C, amend. 602 (Nov. 1, 2000). Ironically, that policy statement, as revised in 2008, now recognizes that post-sentencing conduct is relevant. *See* USSG § 1B1.10, p.s., comment. (n.1(B)(iii)) (inviting

This Court has recognized that it is not for the courts of appeals to ban certain factors because, in their view, consideration of the factor might cause a disparity. "Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities – along with other § 3553(a) factors – when imposing sentences," weighing any disparities "against the other § 3553(a) factors and any unwarranted disparity created by the [guideline] itself." *Kimbrough*, 552 U.S. at 108.

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courts to consider post-sentencing conduct in determining whether a reduction is warranted and the extent of such reduction within the amended guideline range). If post-sentencing conduct is relevant for that purpose, post-sentencing rehabilitation is surely relevant for purposes of a variance below an advisory guideline range. *Cf. United States v. Douglas*, 576 F.3d 1216, 1220 (11th Cir. 2009) (noting that circuit has held that post-sentencing conduct is an impermissible factor under § 3553(a), but the Commission has made it relevant under § 1B1.10, and reversing because district court did not sufficiently consider evidence of post-sentencing rehabilitation).

CONCLUSION

The Eighth Circuit's appellate ban on consideration of evidence of post-sentencing rehabilitation violates the governing statutes, and also is not supported by any legitimate rationale. This Court should therefore reject it. This Court should vacate the judgment of the court of appeals and remand with instructions that no sentence imposed on remand require Jason Pepper to serve additional time in prison.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JASON PEPPER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

NACDL agrees with Petitioner and the Government that post-sentencing rehabilitation is a permissible basis for granting a downward variance under 18 U.S.C. § 3553(a) during resentencing. NACDL writes separately to emphasize that granting a downward variance at resentencing on the basis of post-sentencing rehabilitation is not foreclosed by 18 U.S.C. § 3742(g)(2) because that 2003 statute—which mandates that district courts follow the United States Sentencing Guidelines (the "Guidelines" or "U.S.S.G.") when cases are remanded for resentencing—is invalid under *United States v. Booker*, 543 U.S. 220 (2005), and should be excised from the Sentencing Reform Act of 1984 ("SRA").

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Sentencing Guidelines now perform an advisory role in the federal sentencing scheme. This Court held in *Booker* that the SRA assigned a role to the Guidelines that violated the Fifth and Sixth Amendments under the Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court also held that the SRA could be saved by excising those provisions that formed the basis of the constitutional violation, thus leaving in place a statutory system under which district courts must consider, but are no longer bound by, the Guidelines.

In particular, *Booker*'s remedial holding invalidated two provisions of the SRA: Sections 3553(b)(1) and 3742(e). The Court excised Section 3553(b)(1) from the statute because that provision directed the Guidelines to be employed unconstitutionally, and the Court excised Section 3742(e) because its opera-

tion depended, among other things, on a cross-reference to Section 3553(b).

Sentencing is now governed by Section 3553(a), which requires district courts—after considering the Guidelines together with a variety of sentencing objectives and other factors—to impose a sentence "sufficient, but not greater than necessary" to comply with those objectives. 18 U.S.C. § 3553(a). As Petitioner and the Government explain, that directive contemplates that district courts on remand may impose a sentence below the Guidelines range based on evidence showing that a defendant has rehabilitated himself, no longer poses a threat to his community, and would benefit from continued access to educational and vocational training outside prison.

NACDL writes separately to note that there is also another SRA provision, not mentioned in *Booker*, that cross-references Section 3553(b)(1) and in many cases would make the imposition of a sentence within the Guidelines mandatory. Section 3742(g)(2)—a statutory provision enacted before *Booker* was decided but that the Court did not address in that case—requires a district court to impose a sentence within the Guidelines range on remand from an appeal of the original sentence. The provision permits a sentencing judge to "depart[]" from that range only (1) as provided in the Guidelines themselves, (2) when the judge included the departure in its "written statement of reasons . . . in connection with the previous sentencing," and (3) when the court of appeals specifically held that it was a "permissible ground of departure." 18 U.S.C. § 3742(g)(2).

If Section 3742(g)(2) still governs after *Booker*, it is plainly relevant to this case. The Guidelines Manual states that post-sentencing rehabilitative efforts are not an "appropriate basis for a downward departure," U.S.S.G. § 5K2.19, and such post-sentencing efforts by definition could not have been considered during the initial sentencing proceeding. Accordingly, Section 3742(g)(2) would appear to foreclose a district court's consideration of post-sentencing rehabilitation on remand.

Yet neither the Government nor the Eighth Circuit relied on that provision below. And for good reason: Section 3742(g)(2) and *Booker* plainly cannot co-exist. The Government—which has a duty to defend the validity of this statute if it can—agrees here that subsection (g)(2) "is invalid after *Booker*." U.S. Br. 48. This Court should confirm the point and hold expressly in this case that Section 3742(g)(2) cannot be enforced in light of *Booker*, and must be excised from the SRA.

Section 3742(g)(2) offends the Constitution for the very same reasons as the SRA provisions this Court invalidated in *Booker*. The statute violates the Sixth Amendment by mandating compliance with the Guidelines on remand and requiring judges to determine sentence-enhancing facts not found by the jury or admitted in a defendant's plea. And like the excised Section 3742(e), Section 3742(g)(2) cross-references the now-excised Section 3553(b)(1). Section 3742(g)(2) was also enacted for the express purpose of mandating strict compliance with the Guidelines—a purpose that no longer remains valid after *Booker*.

In addition, Section 3742(g)(2) precludes district courts from varying from the Guidelines at resentencing based on the factors set forth in Section 3553(a). Under Section 3742(g)(2), the only permissible grounds for imposing a sentence outside the applicable Guidelines range are those authorized under Section 3553(b)(1)—the very provision that rendered the Guidelines mandatory, that the Court excised in *Booker*, and that permits consideration only of "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b)(1). Requiring compliance with Section 3742(g)(2) after *Booker* would also lead to unfair and absurd consequences for both the Government and defendants—consequences that have led courts to ignore the provision altogether.

ARGUMENT

I. *BOOKER*'S CONSTITUTIONAL HOLDING APPLIES WHEN A DISTRICT COURT RESENTENCES A DEFENDANT UNDER SECTION 3742(g)(2).

Since *Booker*, this Court has stated consistently that the Sixth Amendment does not permit the Guidelines to be treated as mandatory in sentencing proceedings. *E.g.*, *Dillon v. United States*, 130 S. Ct. 2683, 2687-88 (2010); *Gall v. United States*, 552 U.S. 38, 46 (2007); *Rita v. United States*, 551 U.S. 338, 354 (2007); *see also Dillon*, 130 S. Ct. at 2698 (Stevens, J., dissenting) (*Booker* "eliminated the mandatory features of the Guidelines—all of them"). Nevertheless, the Court has yet to consider (and thus to invalidate) one provision of the SRA—Section 3742(g)(2)—that was passed expressly to mandate

compliance with the Guidelines. Like the provisions *Booker* invalidated, Section 3742(g)(2) requires district courts to impose Guidelines sentences that often depend on facts never admitted by the defendant or found by a jury beyond a reasonable doubt.

1. In 2003, Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"). Pub. L. No. 108-21, § 401(d)(1), 117 Stat. 670, 667-76. Several provisions in the PROTECT Act were added as a result of a last-minute rider—the so-called "Feeney Amendment"—which sought to address a perceived "problem of downward departures from the Federal Sentencing Guidelines." H.R. Rep. No. 108-66, at 50 (2003) (Conf. Rep.), *reprinted in* 2003 U.S.C.C.A.N. 683, 693-94; *see* Mark Osler, *Uniformity and Traditional Sentencing Goals in the Age of Feeney*, 16 Fed. Sent. Rep. 253, 253-56 (2004). These new provisions effectively made "Guidelines sentencing even more mandatory than it had been." *Booker*, 543 U.S. at 261.

In *Booker*, the Court excised one provision of the PROTECT Act's Feeney Amendment: Section 3742(e). That section provided for *de novo* review and required an appellate court to set aside a district court's departure from the "applicable guideline range" if, among other things, it was "based on a factor that . . . [was] not authorized under section 3553(b)." 18 U.S.C. § 3742(e). The Court held that Section 3742(e) was incompatible with the Sixth Amendment because, *inter alia*, it "cross-references . . . § 3553(b)(1)." *Booker*, 543 U.S. at 260. The Court excised Section 3553(b)(1), in turn, because it re-

quired sentencing courts to impose Guidelines sentences that often called for judicial determinations of sentence-enhancing facts. *Id.* at 259.[2] Those judicial determinations violate the Sixth Amendment because they require judges to find facts that enhanced a sentence above the maximum Guidelines sentence authorized by a jury verdict or guilty plea. *Id.* at 244.

The availability of "departures" from the applicable Guidelines sentences under Section 3553(b)(1) did not alter the Court's conclusion. *Id.* at 234. The Court noted that "departures are not available in every case, and in fact are unavailable in most." *Id.* As a result, sentencing courts generally were "bound to impose a sentence within the Guidelines range." *Id.* And, although the Court recognized that not all Guidelines sentences required unconstitutional judicial fact-finding, it rejected a two-track system in which the Guidelines were mandatory in some cases

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[2] Section 3553(b) stated, in pertinent part, that a sentencing court:

> shall impose a sentence of the kind, and within the range referred to [in the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the [Guidelines], policy statements, and official commentary of the Sentencing Commission.

18 U.S.C. § 3553(b)(1).

but not others. A two-track system, the Court explained, would be inconsistent with Congressional intent and impracticable to administer. *Id.* at 266. Accordingly, the Court held that the Guidelines must be treated as advisory in all cases. *Id.*

2. The Feeney Amendment added another provision—not at issue in *Booker*—that also mandates Guidelines sentencing. Section 3742(g)(2) provides that, upon remand, a district court:

> shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that . . . [t]he court shall not impose a sentence outside the applicable guidelines range except upon a ground that—(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and (B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

18 U.S.C. § 3742(g)(2). "Permissible ground of departure," in turn, is narrowly defined by reference to Section 3553(b). 18 U.S.C. § 3742(j).

Section 3742(g)(2) offends the Sixth Amendment for the same fundamental reasons as Sections 3553(b)(1) and 3742(e): it requires district courts to impose Guidelines sentences that often depend upon facts found by a judge by a mere preponderance of the evidence—not those admitted by the defendant

in a plea agreement or found, beyond a reasonable doubt, by a jury. *See Booker*, 543 U.S. at 244-45.

Section 3742(g)(2) is mandatory in multiple ways. Most obviously, it requires courts to sentence defendants "in accordance with section 3553," 18 U.S.C. § 3742(g)(2)—a command that encompasses Section 3553(b)(1), the very "provision that makes the relevant sentencing rules . . . mandatory and impose[s] binding requirements on all sentencing judges." *Booker*, 543 U.S. at 259 (quotations omitted). But Section 3742(g)(2) also does more, stating in addition that district courts "*shall not* impose a sentence outside the applicable guidelines range" except in specific circumstances. *Id.* (emphasis added); *see Booker*, 543 U.S. at 233-34; *Gall v. United States*, 552 U.S. 38, 51 (2007) (district courts commit reversible error by "treating the Guidelines as mandatory"); *cf. Rita v. United States*, 551 U.S. 338, 351 (2007) (district courts do "not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.").

Indeed, the district court's authority to depart from the Guidelines on remand is even more restricted than a court's pre-*Booker* authority to depart from the mandatory Guidelines range imposed by Section 3553(b)(1). Under Section 3742(g)(2), a district court may depart from the applicable Guidelines range on remand *only* if the court specified in its "written statement of reasons" at the initial sentencing proceeding that the defendant qualified for the departure. 18 U.S.C. § 3742(g)(2)(A). And even that does not suffice to permit departure: the appellate court also must have determined that the pro-

posed departure was a "permissible ground of departure." 18 U.S.C. § 3742(g)(2)(B). Section 3742(j)(1), in turn, defines a "'permissible' ground of departure" as one that "(A) advances the objectives set forth in section 3553(a)(2); *and (B) is authorized under section 3553(b)*; and (C) is justified by the facts of the case." 18 U.S.C. § 3742(j)(1) (emphasis added). Thus, Section 3742(g)(2) resurrects the mandatory nature of the Guidelines by requiring compliance with Section 3553(b) on remand, and is invalid for that reason.

An example illustrates the Sixth Amendment problem: Assume that at the initial sentencing proceeding, the court determines that the base offense level based on the jury's verdict authorizes a sentence of 51-63 months. The court adjusts his sentence upward, however, imposing a 97-month sentence based on its own finding that the defendant was an organizer of an extensive criminal enterprise. *See* U.S.S.G. § 3B1.1(a) (requiring four-level increase to base offense level for defendant's aggravating role). Because the total offense level and corresponding Guidelines range are merely advisory, the court's adjustment does not violate the Sixth Amendment. *Booker*, 543 U.S. at 233. The court of appeals then vacates the sentence for any number of reasons, remanding the case for plenary resentencing. At the resentencing hearing, the judge again considers the defendant's organizing role and makes detailed findings in support of the identical adjustment applied at the initial sentencing proceeding. Under Section 3742(g)(2), the judge must now treat the Guidelines as mandatory and impose the upward adjustment based on the court's own factual findings. Because

the adjustment results in a sentence greater than the maximum penalty permitted by the Guidelines based on the facts found by the jury beyond a reasonable doubt, the sentence violates the Sixth Amendment. *Booker*, 543 U.S. at 244; *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

Section 3742(g)(2) also appears to preclude sentencing courts on remand from granting any and all variances under Section 3553(a). In *Irizarry v. United States*, 128 S. Ct. 2198, 2202 (2008), the Court held that a "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." A "variance," by contrast, is a non-Guidelines sentence *outside* the Guidelines framework. *Id.*; *see also id.* at 2204 (Breyer, J., dissenting) (noting that the Court's decision creates a "legal distinction" between "departures" and "variances").[3] Because Section 3742(g)(2) only permits a non-Guidelines sentence "upon a ground . . . held by the court of appeals . . . to be a permissible ground of *departure*" and such a departure must be "authorized under section 3553(b)," a district court on remand is prevented by the statute from granting a variance outside the Guidelines framework. *See Irizarry*, 128 U.S. at 2202-03; *see also id.* ("there is no longer a limit comparable to the one at issue in [*Burns v. United States*, 501 U.S. 129 (1991)] on the variances

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[3] Citing *Irizarry*, the Sentencing Commission has proposed amending the Commentary to U.S.S.G. § 1B1.1 to distinguish between "departures" and "variances." Notice of Submission to Congress of Amendments to the Sentencing Guidelines, 75 Fed. Reg. 27,388, 27,392 (May 14, 2010).

from Guidelines ranges that a district court may find justified under the sentencing factors set forth in" Section 3553(a)).

Because Section 3742(g)(2) requires a court on remand to impose a sentence within the Guidelines, and the determination of that range will often depend upon judge-found facts, the provision violates a defendant's Sixth Amendment right to "have the jury find the existence of 'any particular fact' that the law makes essential to his punishment." *Booker*, 543 U.S. at 232 (quoting *Blakely*, 542 U.S. at 301).[4] For this reason, Section 3742(g)(2) cannot be invoked to justify the decision below.

II. SECTION 3742(g)(2) MUST BE EXCISED UNDER *BOOKER*'S REMEDIAL HOLDING.

In *Booker*, this Court determined that the only "appropriate cure" for the Sixth Amendment violation was to excise those provisions of the SRA that rendered the Guidelines mandatory or depended on their binding nature. *Kimbrough v. United States*,

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[4] The Court's recent decision in *Dillon v. United States*, 130 S. Ct. 2683 (2010), that *Booker*'s remedial holding does not apply to Section 3582(c) sentence-modification proceedings has no application to the validity of Section 3742(g)(2). The Court in *Dillon* determined that, given their limited scope and purpose, Section 3582(c) proceedings are *not* equivalent to a "sentencing or resentencing proceeding." *See id.* at 2690-91 (citing 18 U.S.C. § 3742(f), (g)). Proceedings like Petitioner's, on remand for resentencing, *are* "sentencing proceedings," and—unlike the limited sentence modification proceeding at issue in *Dillon*, which could only result in a sentence reduction, *id.* at 2690—facts found by a judge at a resentencing proceeding may increase a defendant's sentence.

552 U.S. 85, 100-01 (2007); *Booker*, 543 U.S. at 245. That remedial holding was meant to apply to all cases on direct appeal and on remand for resentencing, *see Booker*, 543 U.S. at 267-68—a mandate that cannot be squared with Section 3742(g)(2)'s requirement of mandatory Guidelines sentences on remand. Properly understood, *Booker* "eliminated the mandatory features of the Guidelines—all of them." *Dillon*, 130 S. Ct. at 2698 (Stevens, J., dissenting); *see Booker*, 543 U.S. at 259 ("With [Sections 3553(b)(1) and 3742(e)] excised (*and statutory cross-references to the two sections consequently invalidated*), the remainder of the Act satisfies the Court's constitutional requirements.") (emphasis added). Because Section 3742(g)(2) is incompatible with *Booker*'s constitutional and remedial holdings, the Court should explicitly invalidate it now.

1. At the core of *Booker*'s remedial holding was the recognition that, if the Guidelines were "merely advisory provisions"—as they are employed, for instance, under Section 3553(a)(4)—the Guidelines would not violate the Sixth Amendment. *Booker*, 543 U.S. at 233. When determining which sections of the SRA to excise, therefore, the Court looked to the provisions whose mandatory nature made them "a necessary condition of the constitutional violation." *Id.* at 259. Section 3553(b)(1), which made the Guidelines mandatory, was excised under that standard. *Id.* So, too, was Section 3742(e), which cross-referenced Section 3553(b)(1). *Id.* at 260.

Section 3742(g)(2) is no different from either of those provisions because it too mandates compliance with the Guidelines. *See* pp. 8-12, *supra*. Because

its binding nature is a necessary condition of its constitutional violation, the same reasons that prompted the excision of Sections 3553(b)(1) and 3742(e) require excision of Section 3742(g)(2) as well. Indeed, Justice Stevens observed as much in his dissenting opinion in *Dillon*. *Dillon*, 130 S. Ct. at 2698 n.5 (Stevens, J., dissenting) ("[A]t least one additional provision of the [SRA] should have been excised, but was not, in order to accomplish the Court's remedy. Section 3742(g)(2) prescribes that the Guidelines are to have binding effect upon a remand for a new sentence in a direct appeal.").[5]

Section 3742(g)(2) does not function independently of the now-excised Section 3553(b)(1), either. *See Booker*, 543 U.S. at 259 (retaining those sections of the SRA that functioned independently of its mandatory provisions). To the contrary, the resentencing statute works in tandem with Section 3553(b)(1), precluding judges from straying from the applicable Guidelines range except upon a ground that is a "permissible ground of departure"—*i.e.*, one authorized by the now-excised Section 3553(b)(1). 18 U.S.C. § 3742(g)(2), (j)(1)(B); *see also Booker*, 543 U.S. at 260 (excising Section 3742(e) because of its "critical cross-references" to Section 3553(b)(1)).

As discussed above, this limitation also appears to prohibit judges from varying from a Guidelines sentence based on the factors set forth in Section 3553(a)—the very same factors those judges "must consider" under *Booker* and its progeny. *Gall v.*

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[5] Because the majority did not view the process under consideration in *Dillon* to be a "sentencing" proceeding, the Court's opinion is silent on the continued validity of Section 3742(g)(2).

United States, 552 U.S. 38, 50 n.6 (2007). Thus, permitting Section 3742(g)(2) to remain in force would foreclose a court from varying *below* the applicable Guidelines range, even if it found that a within-range sentence would be greater than necessary to achieve the purposes of sentencing, 18 U.S.C. § 3553(a), or would create unwarranted disparities among co-defendants, as the district court previously concluded here, *id.* § 3553(a)(6); J.A. 79.

Section 3742(g)(2) would also preclude a court from varying *above* the applicable Guidelines range if it found, for instance, that in light of the defendant's post-imprisonment misconduct, such a sentence was necessary to protect the public from further crimes. 18 U.S.C. § 3553(a)(2)(C). And it would bar a court on remand from exercising its discretion, recently acknowledged by this Court, to vary from a Guidelines sentence in some circumstances because of a general policy disagreement with the applicable Guidelines range, *see Spears v. United States*, 129 S. Ct. 840, 843 (2009) (per curiam)—even if the court had exercised that precise discretion at the initial sentencing and that decision had not been challenged on appeal. Such an incongruous system further underscores why Section 3742(g)(2) should be excised. *See* U.S. Br. 48 ("By restricting the authority of district courts to vary from the applicable Guidelines range at resentencing, Section 3742(g)(2) is invalid after *Booker*.").

Nor does "Congress's basic purpose in enacting" Section 3742(g)(2) preclude excision of that provision. *See Booker*, 543 U.S. at 259. To the contrary, Section 3742(g)(2) was added when Congress passed

the PROTECT Act, legislation intended "to make Guidelines sentencing even more mandatory than it had been." *Booker*, 543 U.S. at 261. That purpose "ceased to be relevant" in light of *Booker*. *Id.*; *see also id.* at 298 (Stevens, J., dissenting) (*Booker*'s remedial holding "has made the PROTECT Act irrelevant").

If anything, permitting Section 3742(g)(2) to remain in force would frustrate Congress's basic intent in creating the Guidelines in the first instance: to provide certainty, fairness, and uniformity in sentencing. *Booker*, 543 U.S. at 264. It would make little sense to require a district court to consider the Section 3553(a) factors during a defendant's initial sentencing proceeding and an appellate court to review the resulting sentence for abuse of discretion in light of those factors while, at the same time, requiring the district court on remand to comply with the Guidelines and depart from them only on the grounds authorized by the now-excised Section 3553(b)(1). *Compare Gall*, 552 U.S. at 51 *with* 18 U.S.C. § 3742(g)(2). *Booker* itself foreclosed a "two-system proposal" to treat the Guidelines as mandatory in some cases and non-mandatory in others, finding that such an approach would not further "Congress' basic objective of promoting uniformity in sentencing." *Booker*, 543 U.S. at 266-67; *Dillon*, 130 S. Ct. at 2693 ("The incomplete remedy we rejected in *Booker* would have required courts to treat the Guidelines differently in similar proceedings, leading potentially to unfair results and considerable administrative challenges."). Section 3742(g)(2) is therefore fundamentally incompatible with the post-*Booker* federal sentencing regime.

For these reasons, it is also of no consequence to the Court's remedial analysis that not all resentencing proceedings run afoul of the Sixth Amendment. In this case, for instance, the judge made no findings that increased Petitioner's sentence beyond the Guidelines range authorized under his plea agreement. J.A. 330-39. Enforcing Section 3742(g)(2) in cases like Petitioner's while rendering the provision inapplicable in all other proceedings would create precisely the type of administrative complexities that *Booker*'s remedial holding sought to avoid. *Booker*, 543 U.S. at 266-67. It would also create a "one-way lever[]," rejected in *Booker*, that mandates strict adherence to the Guidelines in cases where a judge reduces a sentence beyond that authorized by a jury verdict or defendant's guilty plea, but applies no such limits in cases where the judge increases a sentence. *Id.* at 266.

2. Unfair and even absurd consequences will also result if Section 3742(g)(2) is not excised. This case proves the point: applying Section 3742(g)(2) without regard to *Booker* may foreclose the consideration of factors, such as post-sentencing rehabilitation, that are encompassed by Section 3553(a), but that have been rejected by the Sentencing Commission as grounds for "departure," *see* U.S.S.G. § 5K2.19, and that could by their very nature never be included in the district court's written statement of reasons at the initial sentencing proceeding or have been declared "permissible" on appeal.

Moreover, Section 3742(g)(2) may preclude a wide range of departures at resentencing even when those departures *are* memorialized at the initial sentenc-

ing proceeding and permitted by the Guidelines themselves. Consider a sentencing proceeding at which the district court departs upward under U.S.S.G. § 5K2.2, based on its finding that the victim suffered significant physical injury, but also departs downward under U.S.S.G. § 5K1.1, finding that the defendant provided substantial assistance to the government. If the defendant appeals the sentence on the basis of the upward departure but the government does not appeal the downward departure, the court of appeals could remand the case for resentencing on the sole basis that the upward departure was impermissible, but would have no occasion to address the departure for substantial assistance. On remand, Section 3742(g)(2) would preclude the district court from approving the same (or any) departure under U.S.S.G. § 5K1.1, potentially leading to a longer sentence than what the defendant originally received and undermining the system of rewards for providing substantial assistance to authorities.

The Government likewise may be prejudiced if Section 3742(g)(2) is not excised. Assume, for example, that a district judge departs downward under U.S.S.G. § 5H1.6, based on a finding that the defendant's family would suffer a substantial loss of caretaking and financial support. But the court also (i) increases the applicable Guidelines range because the defendant's criminal history was substantially underrepresented, U.S.S.G. § 4A1.3, and (ii) varies upward, beyond a Guidelines sentence, because the defendant's ongoing pattern of criminal activity poses a danger to the public, 18 U.S.C. § 3553(a)(2)(C). If the government successfully challenges the downward departure but the defendant

does not cross-appeal, the court of appeals cannot make a determination about the upward departure or variance. If so, Section 3742(g)(2) would preclude the district court from imposing any upward criminal history departure as well as from granting any variance at resentencing.

3. Section 3742(g)(2)'s incompatibility with *Booker*'s remedial holding is perhaps best illustrated by the way courts have applied the statute since the Guidelines were rendered advisory. With few exceptions, they have declined to apply it. Indeed, in *Booker* itself, this Court remanded Booker's and Fanfan's cases to the district courts to "impose . . . sentence[s] in accordance with today's opinion." *Booker*, 543 U.S. at 267-68. The Court nowhere suggested that the district courts, on remand, should abide by the mandatory Guidelines sentencing requirements in Section 3742(g)(2). To the contrary, the Court stated that, if the sentences were appealed, the court of appeals should review the sentences for unreasonableness "with regard to § 3553(a)"—not Section 3553(b)(1). *See id.* at 261, 267.[6]

Similarly, with the exception of the Eighth Circuit, many courts have treated the statute as implicitly invalid under *Booker* or, as in most cases, have

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[6] The Eighth Circuit's disposition of this case underscores how *Booker* and Section 3742(g)(2) cannot be reconciled. In *Pepper I*, the Eighth Circuit remanded Petitioner's case for resentencing "in accordance with . . . the principles set forth by the Supreme Court in *Booker*," J.A. 70—a mandate that would be meaningless if, under Section 3742(g)(2), the district court were required to impose a Guidelines sentence.

simply ignored it. *See, e.g.*, *United States v. Harrison*, 362 F. App'x 958, 962, 966 (11th Cir. 2010) (affirming district court's "upward variance" at resentencing based on Section 3553(a) factors despite defendant's argument that Section 3742(g)(2) precluded that result); *United States v. Hernandez*, 604 F.3d 48, 54 (2d Cir. 2010) (holding that at resentencing district court may consider "an issue [that] became relevant only after the initial appellate review," such as post-sentencing rehabilitation); *see also United States v. Bruce*, 256 F. App'x 520, 523 n.1 (3d Cir. 2007) (holding that Section 3742(g)(2) did not bar reimposition of upward departure on remand where the defendants were initially sentenced before the provision was enacted; also raising concerns about constitutionality of Section 3742(g)(2) after *Booker*); *but see United States v. Mills*, 491 F.3d 738, 743 (8th Cir. 2007) (holding, without citing *Booker*, that Section 3742(g)(2) precluded consideration at resentencing of downward departure that was not included in written statement of reasons at initial sentence proceeding; but also remanding "for re-sentencing with consideration of the § 3553(a) factors").

After *Booker*, Section 3742(g)(2)'s mandatory Guidelines sentencing provisions can no longer stand. The only "appropriate cure," *Kimbrough*, 552 U.S. at 100, is to excise those provision from the SRA. As a result, district courts should be directed on remand to impose sentences in accordance with *Booker* and its progeny.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's and the Government's briefs, the Court should excise Section 3742(g)(2) from the SRA. Because the judgment below cannot be affirmed on the basis of that invalid provision, the Court should also reverse that judgment and hold that Section 3553(a) permits district courts to consider post-sentencing rehabilitation at resentencing proceedings.

Respectfully submitted,

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Dated: September 7, 2010

AMICUS CURIAE BRIEF

No. 09-6822

In The
Supreme Court of the United States

JASON PEPPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. §3553(a) after *Gall* v. *United States*?

2. Whether as a sentencing consideration under 18 U.S.C. §3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation?

3. When a district court judge is removed from resentencing a defendant after remand, and a new judge is assigned, is the new judge obligated under the doctrine of the "law of the case" to follow sentencing findings issued by the original judge that had been previously affirmed on appeal?

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INTEREST OF *AMICUS CURIAE*

This brief is submitted by Adam G. Ciongoli, *Amicus Curiae* in support of the judgment below, under the Court's order of July 22, 2010.[1] *Amicus* addresses the first two Questions Presented, on which the Government concedes error. *Amicus* adopts the Government's arguments in support of the judgment below on the third Question Presented.

SUMMARY OF THE ARGUMENT

The Eighth Circuit's holding that a district court may not consider evidence of post-sentencing rehabilitation in resentencing is not only permissible—it is compelled by Congress' unambiguous language in 18 U.S.C. §3742(g)(2). As conceded by the Government, see Gov't Br. 47, the plain language of 18 U.S.C. §3742(g)(2), which governs sentencing upon remand, clearly prohibits district courts from granting a variance based on grounds that were not "specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal." 18 U.S.C. §3742(g)(2)(A). By definition, post-sentencing rehabilitation could not have been

[1] Under Supreme Court Rule 37.6, *Amicus* affirms that no counsel for a party authored any part of this brief, and no person other than *Amicus* and his co-counsel made a monetary contribution to fund its preparation or submission.

considered at the original sentencing and, therefore, cannot serve as the basis for a variance during resentencing. See *id.* This statute reflects a variety of important and permissible policy judgments by Congress, not least of which is to promote an orderly and effective appellate process by limiting district courts' ability to circumvent appellate mandates using new information.

Nonetheless, Petitioner and the Government urge the Court to reverse the Eighth Circuit's holding and, in so doing, they ask the Court—for the first time since its decision in *United States v. Booker,* 543 U.S. 220 (2005)—to use *Booker* to invalidate a duly enacted federal statute. Pet'r Br. 32 n.13; Gov't Br. 48. The customary reluctance to conclude that a duly enacted statute violates the Constitution does not appear to have figured into the Government's confession of error; the brief confessing error does not even acknowledge the statute. See generally Br. Opp'n.

The Court should decline this invitation, as §3742(g) survives *Booker*. Indeed, the Court fully reviewed §3742 in *Booker* and did not excise §3742(g). Nor does the statute in any way implicate the Sixth Amendment concerns raised in *Booker*, or make the Guidelines otherwise impermissibly mandatory. To the contrary, §3742(g) permits district courts to vary from the Guidelines based on any and all grounds that were considered in the original sentencing and that were not held to be impermissible by the court of appeals. See 18 U.S.C. §3742(g)(2)(A), (B).

In addition to preserving a meaningful role for appellate courts in sentencing cases—a role reaffirmed by *Booker*, 543 U.S., at 260-262, and its progeny—§3742(g)(2) ensures the mechanism of an effective appeal by both the Government and defendants, which is particularly important given the broad sentencing latitude left to district courts post-*Booker*. It also serves Congress' "basic goal in passing the Sentencing Act" of reducing sentencing disparities between defendants convicted of similar offenses. *Id.*, at 253. Unlike policy statements made by the Sentencing Commission in the Guidelines, these are congressional policy choices embodied in statutes that district courts are not free to disregard. *E.g.*, *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 493 (2001) (emphasizing courts' inability to "override a legislative determination manifest in the statute").

Even if §3742(g) were read to make the Guidelines impermissibly mandatory, the Court can and should construe it, or, alternatively, excise other portions of §3742, to avoid any constitutional problems.

Regardless, consideration of post-sentencing rehabilitation by the sentencing court is improper because it defeats the objectives Congress requires courts to consider in 18 U.S.C. §3553(a). In particular, allowing variances based on post-sentencing rehabilitation would create unwarranted disparities in sentences for defendants convicted of similar conduct—only a handful of whom fortuitously would obtain

resentencings in which to present such evidence—*id.*, at §3553(a)(6), and it would thwart the Sentencing Commission's core function of promoting orderly and just sentencing through policy determinations that Congress requires district courts to consider. *Id.*, at §3553(a)(5). Sections 3553(a)(1) and (a)(2), on which the Government and Petitioner heavily rely, do not authorize district courts to disregard the objectives Congress articulated in §§3553(a)(5) and (a)(6). Nor, on their own, do these §3553(a) factors render post-sentencing rehabilitation a proper consideration.

Post-sentencing rehabilitation may play a valid role in determining how a defendant ultimately serves his sentence, but Congress—recognizing the procedural problems of allowing courts to consider this factor during resentencing—instead designed mechanisms under 18 U.S.C. §§3583 and 3624 to effectuate adjustments based on post-sentencing rehabilitation through good time credits and revisions to periods of supervised release. Allowing courts to consider post-sentencing rehabilitation during resentencing would defeat the scheme Congress envisioned and implemented through the interplay of §3742(g) and §§3583 and 3624, frustrating the Sentencing Reform Act's goal of moving away from indeterminate sentencing and unwarranted sentencing disparities.

Because the Eighth Circuit's holding complies with Congress' statutory directives and the reasoned

policy determination of the Sentencing Commission, the Court should affirm the judgment below.

ARGUMENT

I. 18 U.S.C. §3742(g) PROHIBITS DISTRICT COURTS FROM CONSIDERING POST-SENTENCING REHABILITATION DURING RESENTENCING PROCEEDINGS.

The language of 18 U.S.C. §3742(g) is clear: "A district court to which a case is remanded[2] . . . shall not impose a sentence outside the applicable guidelines range except upon a ground that was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal." 18 U.S.C. §3742(g)(2)(A). The district court, bound by statute to consider only the grounds "in connection with the previous sentencing of the defendant," *id.*, is therefore necessarily foreclosed from considering post-sentencing rehabilitation during resentencing proceedings.

The Government and *amicus curiae* the National Association of Criminal Defense Lawyers (NACDL)

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[2] Section 3742(g) governs remands following a determination by a court of appeals that the sentencing court imposed a sentence in violation of law, incorrectly applied the Guidelines, or unreasonably imposed a sentence outside the applicable Guidelines range. 18 U.S.C. §§3742(f)(1)-(2), (g).

both concede that §3742(g) forecloses consideration of post-sentencing rehabilitation "on its face." See Gov't Br. 47; NACDL Br. 4.[3] Indeed, throughout the resentencing proceedings below, the Government consistently argued, post-*Booker*, that "18 U.S.C. §3742(g) requires that only issues raised before at the original sentencing . . . shall be considered at sentencing upon remand." J.A. 82 (March 13, 2006 Resistance to Defendant's Sentencing Memorandum); see also J.A. 178-179 ("As to any other grounds for variance, if they were not raised at the previous sentencing or in the opinion from the Court of Appeals, they may not be considered.") (July 12, 2007 Sentencing Memorandum).[4]

Petitioner, the Government, and NACDL now seek to avoid the plain language of §3742(g), contending that the statute must be invalidated as unconstitutional because it renders the Guidelines impermissibly mandatory in violation of *Booker*. See Pet'r Br. 33; Gov't Br. 48; NACDL Br. 12-20. No such constitutional infirmity exists, as the Court's analysis in *Booker* confirms. See 543 U.S., at 259-264 (examining

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[3] Petitioner claims that "[t]here is no statutory authority for [the Eighth Circuit's] rule," Pet'r Br. 18, but, as the Government and NACDL acknowledge, the plain language of §3742(g) not only supports but compels the Eighth Circuit's ruling. Gov't Br. 47; NACDL Br. 4.

[4] Although the Government and NACDL note that the Eighth Circuit did not expressly rely on 18 U.S.C. §3742(g) in prohibiting consideration of post-sentencing rehabilitation on remand for resentencing, see Gov't Br. 48; NACDL Br. 4, the effect of §3742(g) on Petitioner's resentencing proceedings was litigated and is reflected in the record below. J.A. 82, 178-179.

§3742 in particular and excising §3742(e) while leaving §3742(g) intact).

However, even if *Booker* had not already resolved the fate of §3742(g), the statute withstands constitutional scrutiny because it does not impermissibly compel a district court on remand to impose a Guidelines sentence. The statute simply reflects Congress' view that a district court, on resentencing, may consider only information available to the court of appeals—a limitation that promotes compliance with the appellate court's mandate and ensures sentencing based on the conduct of conviction. See 18 U.S.C. §3742(g)(2)(A)-(B). Section 3742(g)(2) provides no opportunity for increasing punishment based on facts not found by a jury and therefore implicates no Sixth Amendment concerns.

The Court should not lightly embark down a path that would lead it, for the first time since *Booker*, to invalidate a congressional sentencing statute, the policy objective and plain terms of which do not violate the Sixth Amendment. See *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) ("In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people."); *El Paso & N.E. Ry. Co.* v. *Gutierrez*, 215 U.S. 87, 97 (1909) (noting "the reluctance with which this court interferes with the action of a co-ordinate branch of government, and its duty, no less than its disposition, to sustain the enactments of the national legislature, except in clear cases of invalidity").

Should the Court nonetheless re-examine §3742 and determine that subsection (g) yields unconstitutional results, the Court, as in *Booker*, should sever only the portion of §3742 necessary to prevent mandatory imposition of a Guidelines sentence on remand for resentencing. If the Court pursues this approach, *Amicus* urges the Court to preserve §3742(g) in its entirety and to excise, at most, the definitional provision in §3742(j)(1)(B) that informs the circumstances under which a non-Guidelines sentence may be imposed during resentencing under §3742(g)(2)(B). This remedy would minimize injury to Congress' objective to promote fairness and uniformity in all phases of criminal sentencing proceedings, including remands from courts of appeals.

A. The Plain Language of §3742(g)(2) Expressly Forecloses Consideration of Post-Sentencing Rehabilitation.

Because the meaning of §3742(g)(2) is clear, the Court need not engage in statutory interpretation. See, *e.g.*, *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."). The plain text of §3742(g) expressly prohibits a district court from considering, on plenary resentencing, any ground for a sentence outside the Guidelines range unless it "was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal." 18 U.S.C.

§3742(g)(2)(A). As the Government concedes, the statute's clear terms render any conduct or circumstances arising post-sentencing—including post-sentencing rehabilitation—impermissible grounds for a downward variance. Gov't Br. 47; see also *United States* v. *Mills*, 491 F.3d 738, 742 (CA8 2007) (reversing district court for violation of §3742(g) for considering criminal history overrepresentation that did not appear as an original ground for departure); *United States* v. *Andrews*, 390 F.3d 840, 852 (CA5 2004) ("[T]he plain language of §3742(g) appears to handcuff any court on remand.").

The Court must presume that Congress "'says in a statute what it means and means in a statute what it says there.'" *Dodd* v. *United States*, 545 U.S. 353, 357 (2005) (refusing to rewrite statute despite potential for harsh results arising from interplay of two paragraphs within 28 U.S.C. §2255) (quoting *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992)); see also *Tyler* v. *Cain*, 533 U.S. 656, 663, n.5 (2001) ("[E]ven if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds."); *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal quotation marks omitted).

Section 3742(g)(2)(A)'s prohibition against considering new information unavailable at the original sentencing will deny defendants like Petitioner an

opportunity to demonstrate rehabilitation success to a district court following imposition of their original sentences. But this result does not rise to a constitutional defect or render the Guidelines mandatory. It simply limits a district court on remand to a variance based on grounds that were available and considered in connection with the original sentence. In other words, it puts the defendant in the same position as the vast majority of other defendants convicted of similar conduct whose sentences were not vacated and remanded for resentencing and who must use the administrative process established by Congress, see 18 U.S.C. §3624(b), to receive credit for such conduct. See also *infra* Part II.A (discussing the congressional directive to avoid unwarranted sentencing disparities).

Section 3742(g) includes another important feature that affects the grounds a district court may consider on remand for resentencing. In addition to limiting the sentencing court to grounds raised "in connection with the previous sentencing of the defendant prior to the appeal," 18 U.S.C. §3742(g)(2)(A), the statute also precludes imposition of a non-Guidelines sentence based on a ground that was disapproved by the court of appeals in remanding the case for resentencing. *Id.* §3742(g)(2)(B) ("The court shall not impose a sentence outside the applicable guidelines range except upon a ground that . . . was held by the court of appeals, in remanding the case, to be a permissible ground of departure."). Although the Government and NACDL cast this provision as an

impermissible attempt to require a Guidelines sentence in substance, §3742(g)(2)(B) is merely a procedural safeguard imposed by Congress to prevent circumvention of the appellate mandate. Indeed, as the Government acknowledges, see Gov't Br. 47, §§3742(g)(2)(A) and (B) work together to further Congress' intent "to prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory." H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess., 59 (2003).

B. Section 3742(g)(2) Is Valid Post-*Booker*.

Just last term, the Court reaffirmed that §3742(g) "establish[es] the terms of 'sentencing upon remand.'" *Dillon* v. *United States*, 130 S.Ct. 2683, 2691 (2010) (considering applicability of *Booker* to modification proceedings). This recognition of the continuing validity of §3742(g) is unsurprising following *Booker*, in which the Court carefully "examined the [Sentencing Reform Act (SRA)] in depth to determine Congress' likely intent in light of [*Booker*'s] holding," 543 U.S., at 265, and, in a remedial response, excised only two statutory provisions: 18 U.S.C. §§3553(b)(1) and 3742(e). 543 U.S., at 259. The Court emphasized that most of the SRA was "perfectly valid" and that, with these two provisions removed, "the remainder of

the Act satisfies the Court's constitutional requirements." *Id.*, at 258, 259.[6]

The Government, Petitioner, and NACDL cannot credibly argue that the Court in *Booker* somehow overlooked §3742(g), particularly when the Court excised §3742(e) but left §3742(g) in place. See *United States* v. *Williams*, 411 F.3d 675, 677-678 (CA6 2005) ("Although *Booker* excised 18 U.S.C. 3742(e) in its remedy opinion, it left 18 U.S.C. §§3742(f) and (g) intact . . . the remedial majority did not excise [them] and both remain valid law."); cf. *United States* v. *Tanner*, 544 F.3d 793, 797 (CA7 2008) (holding post-*Booker* that §3742(g)(1) requires a sentencing judge to apply the sentencing guidelines in effect at the time of the first sentencing); *United States* v. *Andrews*, 447 F.3d 806, 812, n.2 (CA10 2006) (same). Arguments that §3742(g) is invalid in light of *Booker* are unavailing, and the Court should not revisit the constitutionality of the statute.

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[6] The Government cites Justice Stevens' dissent in *Dillon* in arguing that §3742(g) should have been excised in *Booker* along with §3742(e) and §3553(b)(1). Gov't Br. 48-49 (citing *Dillon*, 130 S.Ct., at 2698 n.5) (Stevens, J., dissenting). The fact remains, however, that the Court carefully scrutinized §3742 in *Booker* and excised only subsection (e). 543 U.S., at 259. Justice Stevens' view regarding §3742(g) failed to elicit comment, much less agreement, from other members of the Court.

1. Section 3742(g)(2) Advances Congressional Sentencing Policy and Preserves the Role of Appellate Courts Without Implicating Sixth Amendment Concerns.

Even if the Court re-examines §3742(g) in light of *Booker*, it is clear that the Sixth Amendment concerns that led the Court to excise §3553(b)(1) and §3742(e) are not triggered by §3742(g)(2). *Booker* held that it was a violation of the Sixth Amendment for a court to increase a defendant's sentence beyond the maximum punishment authorized by the facts established by a guilty plea or a jury verdict. 543 U.S., at 244 (building on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004)). As a remedial measure, the Court excised those statutory provisions that would require a district court to impose a Guidelines sentence rather than merely consider the Guidelines as an advisory factor along with all other sentencing objectives defined by Congress in 18 U.S.C. §§3553(a)(1)-(7). *Booker*, 543 U.S., at 265.

Unlike §3553(b)(1) and §3742(e), which the Court eliminated in *Booker*, §3742(g)(2) does not mandate that a district court impose a Guidelines sentence. It merely prohibits a district court from identifying new grounds to grant a variance at resentencing that were not previously considered in the pre-appeal sentencing proceeding. See 18 U.S.C. §3742(g)(2)(A), (B). Section 3742(g)(2), therefore, promotes orderly administration of resentencing proceedings and

reflects Congress' intent that appellate courts retain a meaningful role in criminal sentencing, see 18 U.S.C. §§3742(f), (g), ensuring that district courts on remand cannot circumvent the appellate court's mandate by citing new grounds to reimpose a previously reversed sentence.

Although, in *Booker*, this Court excised §3742(e), the statute that prescribed the scope of appellate review, 18 U.S.C. §3742(e), the Court made clear that it intended to preserve "Congress' intent to provide appellate review." 543 U.S., at 262. To eliminate appellate review altogether, the Court observed, would "cut the statute loose from its moorings in congressional purpose." *Ibid.* By retaining the remaining provisions of §3742 and the mechanism of appellate review, albeit under the Court-defined "reasonableness" standard, *id.*, at 226, the carefully-fashioned *Booker* remedy properly served the overarching objective of Congress to "iron out sentencing differences" and "avoid excessive sentencing disparities." *Id.*, at 263-264.

The Government argues that §3742(g)(2) is "invalid after *Booker*" because it "*restrict[s]* the authority of district courts to vary from the applicable Guidelines range at resentencing." Gov't Br. 48 (emphasis added). But this criticism overstates the Court's holding in *Booker* and fails to acknowledge the Court's repeated, subsequent affirmations of meaningful appellate review. Although an appellate court cannot require a district court to impose a Guidelines sentence, appellate courts routinely—consistent with

Booker—make a variety of determinations regarding the procedural or substantive reasonableness of a sentence that necessarily "restrict" district courts' ability to vary from the applicable Guidelines range at resentencing. See, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 51 (2007) (authorizing appellate courts to review sentences for substantive reasonableness after "tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range").

As the Court has observed, "[i]n sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur." *Rita* v. *United States*, 551 U.S. 338, 354 (2007). Restrictions on resentencing will occur in every remand in which the appellate court determines the district court imposed a non-Guidelines sentence that was procedurally or substantively unreasonable. See, *e.g.*, *United States* v. *Irey*, 612 F.3d 1160, 1225 (CA11 2010) (en banc) (reversing sentence because district court unreasonably varied downward from the advisory guidelines sentence); *United States* v. *Henry*, 545 F.3d 367 (CA6 2008) (remanding because district court failed to explain why sentence was substantially below Guidelines range despite amount of drugs and role in crime); *United States* v. *Goff*, 501 F.3d 250, 262 (CA3 2007) (remanding because district court failed to properly consider the Guidelines or §3553(a) factors and imposed a "drastic," lenient sentence); *United States* v. *Pugh*, 515 F.3d 1179, 1192 (CA11

2008) (remanding despite appreciation of "the thoughtfulness and care" of the district court, because non-custodial sentence was unreasonably lenient in child pornography case). This unsurprising and routine consequence of appellate review is by no means "invalid after *Booker*." See Gov't Br. 48.

To the contrary, §3742(g)(2) is critical to effectuating Congress' intent to "prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory." H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess., 59 (2003). The instant case is illustrative. The district court originally sentenced Petitioner to 24 months to enable Petitioner to qualify for a drug rehabilitation program. J.A. 43. After the Eighth Circuit determined that this consideration was not a valid ground for quantifying a Guidelines departure for substantial assistance to the Government, J.A. 66-68, the district court on remand imposed the same 24-month sentence based on a new ground not raised in the original sentencing proceeding: post-sentencing rehabilitation. J.A. 69-70, 145. The judge even acknowledged that his decision may have been against prevailing Eighth Circuit law, J.A. 146-147, and, following a second reversal, the court of appeals reassigned the case consistent with the original sentencing judge's reluctance to participate in a third resentencing. J.A. 149, 173.

Section 3742(g) was designed to keep this phenomenon in check and to promote orderly administration of remand proceedings. Despite the post-*Booker* advisory nature of the Guidelines and the enhanced discretion of sentencing judges, judicial discretion

"hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975). Section 3742(g) preserves the role of appellate courts in the criminal sentencing system, promotes fairness and uniformity in sentencing, and remains valid after *Booker* by restricting, but not eliminating, the grounds on which a district court can impose a non-Guidelines sentence on remand for resentencing.

Indeed, appellate review is particularly important now that district courts have broad sentencing discretion. Pre-*Booker*, appeals courts reviewed sentences largely to ascertain that district courts correctly applied mandatory Guidelines. See *Booker*, 543 U.S., at 261. Under the post-*Booker* discretionary sentencing regime, a robust role for appeals courts furthers Congress' goal to reduce unwarranted disparities and implement a more uniform and just sentencing scheme. See *id.*, at 263-264 (noting that Congress would favor meaningful appellate review, which "tend[s] to iron out sentencing differences"); S. Rep. No. 98-225, p. 52 (1983); 28 U.S.C. §991(b)(1)(B). Section 3742(g)(2) reflects a policy determination regarding the role of appellate review that was made by Congress, not the Sentencing Commission. Courts are not free to disregard congressional policy or to substitute their judgment for a clear, statutory directive. Compare, *e.g.*, *Oakland Cannabis*, 532 U.S., at 493 (emphasizing that a court may not "override a legislative determination manifest in the

statute"), with *Kimbrough* v. *United States*, 552 U.S. 85, at 109-110 (2007) (permitting disagreement with Sentencing Commission's policy determination regarding crack/powder cocaine ratio).

2. Section 3742(g) Requires No Remedial Excision in Whole or in Part.

The Government, Petitioner, and NACDL cite various portions of §3742, arguing that they impermissibly require district courts to impose a Guidelines sentence on remand. The plain language of the statute, however, clearly permits district courts on remand to resentence outside the applicable Guidelines range and to rely on any and all factors, provided the factors were identified at the original sentencing (as required by §3553(c)) and were not held to be unlawful by the court of appeals. To the extent certain words or cross-references in §3742(g) might be found to reflect vestiges of the mandatory Guidelines regime, the Court should not invalidate any part of §3742(g)(2), instead using the doctrine of constitutional avoidance to read isolated portions of the statute in a manner consistent with *Booker*.

For example, the introductory paragraph of §3742(g) requires district courts to "resentence a defendant in accordance with section 3553." 18 U.S.C. §3742(g). Although the broad reference to §3553 could be read to impermissibly encompass §3553(b)(1), which this Court excised in *Booker*, that reading is not inescapably compelled by the text. Rather, the

Court can and should construe the reference to §3553 to exclude §3553(b)(1), thereby avoiding any constitutional concern. See, *e.g.*, *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909) ("[I]f the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.").

Similarly, NACDL emphasizes that §3742(g)(2)(B) requires a non-Guidelines sentence to be based on a ground "'held by the court of appeals . . . to be a permissible ground of *departure*.'" NACDL Br. 11-12 (quoting 18 U.S.C. §3742(g)(2)). The term "departure," NACDL contends, is a term of art that specifically refers to Guidelines-authorized grounds to sentence outside the applicable range and thus excludes "variances" based instead on the factors in 18 U.S.C. §3553(a). NACDL Br. 11 (citing *Irizarry* v. *United States*, 553 U.S. 708 (2008) (defining "departure" as a Guidelines-specific term of art in context of Rule 32(h) notice requirement).[6] Under NACDL's reasoning, therefore, no §3553(a) "variance" sentence ever could

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[6] The Court's interpretation of Federal Rule of Criminal Procedure 32(h) does not compel a similarly confined reading of "departure" in §3742(g)(2)(B). As the Court observed, the Rule 32(h) notice requirement was linked to a pre-*Booker* expectation of a Guidelines sentence. *Irizarry*, 553 U.S., at 713-714. By contrast, the Court has emphasized, post-*Booker*, that there is an enduring—if not enhanced—need for meaningful appellate review, and a reading of §3742(g)(2)(B) to include both variances and Guidelines-authorized departures furthers that objective.

be imposed on remand. The Court should reject this hypertechnical construction of §3742(g)(2)(B) for several reasons.

First, §3742(g) was enacted in 2003 as part of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act), which predates the Court's 2005 decision in *Booker*. Pub. L. No. 108-21, §401(e), 117 Stat. 671 (2003). Congress therefore did not include, and could not have included, the term "variance" in drafting §3742(g)(2)(B), even though its intent to effectuate meaningful appellate review of sentences is clearly applicable to both departures and variances. See *supra* Part I.B.1. The use of the term "departure," therefore, should be read as any sentence outside the applicable guidelines range, whether through a Guidelines-defined departure or a §3553(a) variance.

Indeed, this Court's own use of the terms "departure" and "variance" following *Booker* underscores why NACDL's hypertechnical reading should be rejected. Until crystallizing the distinction in *Irizarry* while discussing Rule 32(h), 553 U.S., at 714, the Court treated the term "variance" as virtually indistinct from "departure," with both terms merely signifying a sentence outside the applicable Guidelines range for the underlying conviction. See, *e.g.*, *Gall*, 552 U.S., at 46-47 (interchangeably using "departure" and "variance" to describe an "outside-Guidelines sentence"); *Rita*, 551 U.S., at 350 ("[S]entencing courts . . . may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence).").

To the extent the Court determines that the meaning of "departure" leaves room for debate, it should apply the doctrine of constitutional avoidance and construe the term as signifying any sentence outside the applicable Guidelines range. Reading §3742(g)(2)(B) in this manner would avoid constitutional concerns, see, *e.g.*, *Delaware & Hudson Co.*, 213 U.S., at 407; *United States* v. *Congress of Indus. Orgs.*, 335 U.S. 106, 120-121 (1948), and fulfill Congress' overall goal of preserving a meaningful role for appellate courts, even in the post-*Booker* sentencing regime.

3. Section 3742(j)(1)(B)'s Definition of "Permissible Ground of Departure" Does Not Require Invalidation of §3742(g)(2).

Looking beyond the text of §3742(g) itself, Petitioner, the Government, and NACDL contend that §3742(j)(1), which defines a "'permissible' ground of departure," works in conjunction with §3742(g)(2)(B) to require a Guidelines sentence, rendering §3742(g)(2)(B) invalid after *Booker*. Gov't Br. 49; Pet'r Br. 33, n.13; NACDL Br. 10. They cite, in particular, §3742(j)(1)(B), which defines a permissible ground of departure, in part, as one "authorized under section 3553(b)" —which includes §3553(b)(1), one of the two provisions the Court excised in *Booker*. 543 U.S., at 259. If the Court agrees that the cross-reference in §3742(j)(1)(B) to §3553(b) raises constitutional concerns, it should nonetheless reject the invitation to excise §3742(g)(2), because a less drastic remedy exists. At most, the Court should excise §3742(j)(1)(B), leaving intact the remaining components of the definition

of "'permissible' ground of departure," see 18 U.S.C. §§3742(j)(1)(A), (C),[7] as well as the totality of §3742(g), which includes that defined phrase. See 18 U.S.C. §3742(g)(2)(B).

As in *Booker*, the Court should seek to determine "what Congress would have intended in light of the Court's constitutional holding," 543 U.S., at 246, and "refrain from invalidating more of the statute than is necessary." *Id.*, at 258 (quoting *Regan*, 468 U.S., at 652). Because the remaining portions of §3742(j), as well as the totality of §3742(g), are constitutionally valid and capable of functioning independently and in a manner consistent with Congress' basic objectives in enacting the statute, the Court should not unnecessarily thwart congressional intent by striking these provisions. See *Booker*, 543 U.S., at 223-224, 246 ("We answer the remedial question by looking to legislative intent."). Adopting this limited remedy would permit appellate reasonableness review to remain meaningful and binding, *id.*, at 261-262, while also ensuring that the mandatory Guidelines scheme dismantled in *Booker* remains inoperative.

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[7] Section 3742(j)(1)(A) requires a permissible ground of departure to "advanc[e] the objectives set forth in section 3553(a)(2)," and §3742(j)(1)(C) demands that a non-Guidelines sentence be "justified by the facts of the case." 18 U.S.C. §§3742(j)(1)(A), (C).

II. Permitting District Courts To Consider Post-Sentencing Rehabilitation Would Defeat Congress' Objectives Under §3553(a).

Even if the Court were to find that §3742(g)(2) yields an unconstitutional result under *Booker* requiring its complete invalidation, the Court nonetheless should give weight to Congress' underlying intent in enacting that provision to preserve a meaningful role for appellate review in the sentencing scheme, thereby promoting the Sentencing Reform Act's overall goal of increased fairness and uniformity in sentencing. See, *e.g.*, *Booker*, 543 U.S., at 263-264 (retaining appellate review despite excision of §3742(e), because it "tend[s] to iron out sentencing differences" and furthers Congress' goal of reducing unwarranted disparities). This can be achieved by requiring district courts, on remand, to evaluate the §3553(a) factors in light of the information available at the time of the original sentencing proceeding. This approach is warranted based not only on congressional intent reflected in §3742(g)(2), but also on the plain text of §3553(a) itself. Specifically, permitting consideration of post-sentencing rehabilitation on resentencing would defeat Congress' directive that courts consider the Sentencing Commission's policy statements, 18 U.S.C. §3553(a)(5)(A), and it would create unwarranted sentencing disparities, directly contravening §3553(a)(6). See *United States* v. *Lorenzo*, 471 F.3d 1219, 1221 (CA11 2006) (per curiam).

Although the Government and Petitioner advocate that two other subsections of §3553(a)—§3553(a)(1) and §3553(a)(2)—should be read to authorize consideration of post-sentencing rehabilitation, that

construction is belied by Congress' subsequent enactment of §3742(g), which confirms that Congress never intended §3553(a)(1) and §3553(a)(2) to expand the temporal scope of information to be considered on resentencing. See 18 U.S.C. §3742(g)(2)(A); *Lorenzo*, 471 F.3d, at 1221 ("[W]e are not persuaded that §3553(a)(1) contemplates post-sentencing history and characteristics."); see also *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.") (internal quotation marks omitted); *infra* Part II.C.

While a trial court enjoys broad discretion during sentencing proceedings, it nonetheless is required by statute to take all §3553(a) factors into account, see, *e.g.*, *Rita*, 551 U.S., at 347-348, and it must be reversed if it ignored or slighted a factor that Congress has deemed pertinent. Cf. *United States* v. *Taylor*, 487 U.S. 326, 337 (1988) (emphasizing district court's obligation to exercise discretion under Speedy Trial Act in light of particular factors required by Congress); see also *Oakland Cannabis*, 532 U.S., at 493 (prohibiting disregard for statutorily expressed congressional judgment); *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 47 (1942) (finding an abuse of discretion when the National Labor Relations Board sought to fulfill one congressional objective but "wholly ignore[d] other and equally important Congressional

objectives").[8] Because consideration of post-sentencing rehabilitation would unduly slight §3553(a)(5) and (6), the Court should reject the Government's and Petitioner's §3553(a) analysis.

A. Considering Post-Sentencing Rehabilitation During Resentencing Would Create Unwarranted Disparities That Frustrate the Purpose of 18 U.S.C. §3553(a)(6).

In many ways, §3553(a)(6) most clearly embodies the overarching goals of the Sentencing Reform Act. See, *e.g.*, *Rita*, 551 U.S., at 354 ("Congress sought to diminish unwarranted sentencing disparity."); *Booker*, 543 U.S., at 253 ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."). Prior to the enactment of the SRA, indeterminate sentencing was roundly criticized for its "arbitrary and capricious" nature and for creating the "shameful disparity in criminal sentences" that was the criminal justice system's "major flaw." S. Rep. No. 98-225, p. 38; see also *Mistretta* v. *United States*, 488 U.S. 361, 365 (1989) ("Serious disparities in sentences . . . were common."). Congress was concerned not only that disparate sentencing was unfair to both defendants and to the public, but that "sentences that are

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[8] While district courts must consider all §3553(a) factors, *e.g.*, *Rita*, 551 U.S., at 347, the proper construction and relevance to Petitioner's sentence of factors (a)(3) (the kind of sentences available), (a)(4) (consideration of the applicable Guidelines range), and (a)(7) (restitution) are not disputed before the Court.

disproportionate to the seriousness of the offense create a disrespect for the law." S. Rep. No. 98-225, p. 45-46. Eliminating unwarranted sentencing disparity, therefore, was a "primary goal" of Congress in undertaking sentencing reform and in the ensuing Guidelines system. S. Rep. No. 98-225, p. 52; 28 U.S.C. §991(b)(1)(B) (specifying Commission's objective to "avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct."); see also *Mistretta*, 488 U.S., at 366-367.

The language of §3553(a)(6) plainly reflects this goal, requiring sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a)(6). Because permitting courts to consider post-sentencing rehabilitation would create precisely the type of unwarranted disparities that the SRA was designed to eradicate, prohibiting courts from considering this factor not only would fulfill Congress' directive in §3553(a)(6), but also realize the larger goal of increased certainty and consistency in the federal system so as to "retain the confidence of American society and . . . be an effective deterrent against crime." S. Rep. No. 98-225, p. 49-50.

The plain language of §3553(a)(6) and legislative history of the SRA both demonstrate that Congress redesigned the sentencing system to address the problem of unwarranted sentencing disparity by refocusing the bases of a proportionate sentence to (1) the prior records of offenders and (2) the criminal conduct for which they are to be sentenced. S. Rep.

No. 98-225, p. 65 (criticizing the "unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances"); 18 U.S.C. §3553(a)(6) (focusing on "defendants with similar records" who are found "guilty of similar conduct"); *Booker*, 543 U.S., at 250 (linking Congress' goal of diminishing sentencing disparity to "judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction"). Post-sentencing rehabilitation, which by definition occurs after an offender commits the criminal conduct for which he or she is to be sentenced, does not factor into either of these criteria.

Allowing courts to consider post-sentencing rehabilitation would further contravene §3553(a)(6) because it would inequitably benefit only those who fortuitously gain the opportunity to be resentenced due to procedural happenstance unrelated to the offense itself; that is, only when the sentencing court metes out a legally erroneous or otherwise unreasonable sentence in the first instance. See *United States* v. *Lloyd*, 469 F.3d 319, 325 (CA3 2006) ("[A]n approach permitting a defendant's post-sentencing rehabilitation efforts to impact on a resentence would unfairly disadvantage defendants who were ineligible for re-sentencing and therefore had no opportunity to bring their rehabilitative efforts before the sentencing court.") (internal quotation marks omitted). The resulting disparity would be "grossly unfair." *United States* v. *McMannus*, 496 F.3d 846, 852, n.4 (CA8 2007) (noting that the "vast majority" of defendants receive no sentencing-court review of post-sentencing rehabilitation); *United States* v. *Rhodes*, 145 F.3d 1375, 1384 (CADC 1998) (Silberman, J.,

dissenting) ("Only those prisoners who are lucky enough to have a sentencing judge who commits legal error can benefit from their postconviction conduct."). While every defendant has the opportunity to exhibit rehabilitative efforts post-sentencing, only those who benefit from plenary resentencing following reversal of their original sentence will have the opportunity to present post-sentencing rehabilitative efforts as a basis for downward variance. See *McMannus*, 496 F.3d, at 852, n.4; *Lloyd*, 469 F.3d, at 325; *United States* v. *Sims*, 174 F.3d 911, 912-913 (CA8 1999); *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting).

This procedural phenomenon necessarily creates unwarranted disparities between similarly situated defendants, because other defendants convicted of similar conduct who have post-sentencing rehabilitation success but are not "lucky" enough to be resentenced will not have the opportunity to have that success influence the sentence imposed. See *McMannus*, 496 F.3d, at 852, n.4; *Lloyd*, 469 F.3d, at 325; *Sims*, 174 F.3d, at 912; *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting); 18 U.S.C. §3742. Even a defendant with superlative rehabilitative efforts cannot earn a downward variance on that basis if his original sentence was legally "reasonable." 18 U.S.C. §3742(f)(3) (requiring affirmance of lawful sentences). Such disparity in sentencing and, more fundamentally, in procedural opportunity, exemplifies the very unwarranted disparities that Congress sought to eradicate in the SRA. S. Rep. No. 98-225, p. 53-54; 28 U.S.C. §991(b)(1)(B). Indeed, when the Commission considered this very issue, it determined that "such a

departure would . . . inequitably benefit only those who gain the opportunity to be resentenced *de novo*." U.S.S.G. §5K2.19 cmt. background (2000); see *infra* Part II.B.

Procedural happenstance is an unjustifiable basis to authorize district courts to contravene §3553(a)(6). Even circuits that have permitted consideration of post-sentencing rehabilitation have acknowledged the problematic disparities that arise. See *Lloyd*, 469 F.3d, at 325 (doubting that a district court would ever be able permissibly to consider post-sentencing rehabilitation during resentencing); *Quesada Mosquera* v. *United States*, 243 F.3d 685, 686-687 (CA2 2001) (per curiam) (noting the inequity eliminated by §5K2.19).

The Government erroneously contends that *Rhodes*, 145 F.3d, at 1381, illustrates why any resulting disparity from resentencing is warranted. See Gov't Br. 42. *Rhodes* is inapposite, however, because the defendant was resentenced after reversal of his *conviction*, changing the nature of the criminal conduct for which he was to be resentenced. 145 F.3d, at 1381. By contrast, nothing about Petitioner's criminal conduct changed from one sentencing proceeding to the next. Compare S.J.A. 1 (Petitioner's Plea Agreement), with S.J.A. 7-13 (March 18, 2004 Presentencing Investigation Report). Petitioner had the opportunity to benefit from additional sentencing proceedings solely because the Eighth Circuit repeatedly had to correct the erroneous sentences Petitioner received for the same underlying conduct. The distinct nature of a remand for sentencing error

was highlighted in *Rhodes*, in which the D.C. Circuit contrasted that defendant's resentencing following reversal of his conviction with what would have been a "random" event if he were merely "lucky enough" to be resentenced based on the same criminal conduct. 145 F.3d, at 1381.

Distinctions also exist between post-offense, pre-sentencing rehabilitation and post-sentencing rehabilitation, undermining the arguments of the Government and Petitioner that universal acceptance of the former compels adoption of the latter. See Gov't Br. 42-43; Pet'r Br. 47. This attempted analogy ignores crucial procedural differences between the two factors. Every defendant has the right to a sentencing proceeding, in which pre-sentencing rehabilitation, if any exists, can be assessed. But not every defendant obtains plenary resentencing. See *McMannus*, 496 F.3d, at 852, n.4 (noting that the "vast majority" of defendants receive no sentencing-court review of post-sentencing rehabilitation); *Quesada Mosquera*, 243 F.3d, at 686-687; *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting). Unlike pre-sentencing rehabilitation, therefore, whether a downward variance or departure is granted to a defendant on the basis of post-sentencing rehabilitation depends entirely on whether his original sentence was lawfully determined. See 18 U.S.C. §3742(f). Because the resulting disparities are unwarranted, the plain text of §3553(a)(6) precludes consideration of post-sentencing rehabilitation.

B. Considering Post-Sentencing Rehabilitation Contravenes 18 U.S.C. §3553(a)(5).

Congress required sentencing courts to "consider . . . any pertinent policy statement issued by the Sentencing Commission . . . that . . . is in effect on the date the defendant is sentenced." 18 U.S.C. §3553(a)(5). In *Booker*, the Court underscored the importance of the Sentencing Commission's determinations, emphasizing that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." 543 U.S., at 264 (citing 18 U.S.C. §§3553(a)(4), (5)); see, *e.g.*, *United States* v. *Martin*, 371 Fed. Appx. 602, 604-605 (CA6 2010) (unpublished) (remanding because district court failed to reference Guideline §5G1.3 or its application notes). Neither the Government nor Petitioner disputes the enduring importance of the Guidelines or the need for district courts to consider the Commission's policy determinations, as required by §3553(a)(5).

The Commission's policy statement on post-sentencing rehabilitation is clear and unequivocal: "Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense." U.S.S.G. §5K2.19. The Commission articulated several reasons for this prohibition, including the inequitable benefit to "only those who gain the opportunity to be

resentenced *de novo*," as well as "inconsisten[cy] with the policies established by Congress under 18 U.S.C. §3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person," U.S.S.G. §5K2.19 cmt. background—a factor that further militates against consideration of post-sentencing rehabilitation, as discussed *infra* Part III.

The procedural concerns identified by the Commission should be given special weight, as they lie at the heart of the Commission's core function. Congress expressly created the Sentencing Commission to fashion procedural mechanisms to promote certainty and fairness in the sentencing system. 28 U.S.C. §991(b) (emphasizing the Commission's purpose is to "establish sentencing policies and practices of the Federal Criminal justice system"). While Congress retained the legislative prerogative of articulating the substantive objectives for sentencing, see 18 U.S.C. §3553(a)(2), it delegated to the Commission the authority to craft and develop a system to meet those objectives, regularly reevaluating federal sentencing procedures to prevent unwarranted nationwide sentencing disparities. 28 U.S.C. §991(b)(1); 18 U.S.C. §3553(a)(2); see also *Rita*, 551 U.S., at 348 ("Congressional statutes then tell the *Commission* to write the Guidelines that will carry out these same §3553(a) objectives."); *Mistretta*, 488 U.S., at 374-375.

Because the Commission's policy statement, commentary, and considerations regarding §5K2.19 arise from its core mission as defined by Congress, §5K2.19 should be given effect. Cf. *Kimbrough*, 552

U.S., at 108-109 (holding that court permissibly could vary from the Guidelines based on a policy disagreement with the crack/powder sentencing ratio, which did not "exemplify the Commission's exercise of its characteristic institutional role": "to formulate and constantly refine national sentencing standards"); accord *Spears* v. *United States*, 129 S.Ct. 840, 842-843 (2009).

C. Prohibiting Consideration of Post-Sentencing Rehabilitation Is Not Inconsistent with §3553(a)(1) or (a)(2).

Preventing courts from considering post-sentencing rehabilitation does not impermissibly slight the other §3553(a) factors on which the Government and Petitioner rely. Despite attempts to shoehorn post-sentencing rehabilitation into §3553(a)(1), congressional action subsequent to the SRA and legislative history confirm that post-sentencing rehabilitation is not part of the "history and characteristics of the defendant" described in §3553(a)(1). 18 U.S.C. §3553(a)(1); see *Lorenzo*, 471 F.3d, at 1221 (expressing doubt that post-sentencing behavior falls within §3553(a)(1)).

As previously noted, the subsequent passage of the PROTECT Act and §3742(g) demonstrates that Congress did not contemplate expanding the temporal scope of §3553(a)(1) on resentencing to permit consideration of post-sentencing rehabilitation, a factor that, by its nature, could not have been

raised in the original sentencing proceeding. Pub. L. No. 108-21, §401(e), 117 Stat. 671, 18 U.S.C. §3742(g)(2); *Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 308 (1911) ("[S]ubsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."). It is a basic canon of statutory construction that courts should interpret statutory provisions consistently when possible. *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 130 S.Ct. 2433, 2447 (2010); *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (internal quotation marks omitted). Section 3742(g) expressly instructs district courts to contemplate the §3553(a) factors when sentencing upon remand, 18 U.S.C. §3742(g), yet it also confines grounds for a variance to those that (1) were included in the previous sentencing proceeding and (2) were not rejected by the court of appeals. *Id.* §§3742(g)(2)(A), (B).

If the "history and characteristics" of §3553(a)(1) were read to include post-sentencing rehabilitation—a factor that did not exist when the defendant was first sentenced—that impermissibly would render meaningless the procedural mechanism established in §3742(g). Cf. *Bilski* v. *Kappos*, 130 S.Ct. 3218, 3228-3229 (2010) (interpreting two separate statutory provisions to avoid rendering one superfluous, even though enacted at different times); see also *Brown &*

Williamson Tobacco, 529 U.S., at 133 ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (internal quotations marks omitted). This analysis should not change even if the Court were to invalidate §3742(g) under *Booker*. Congress made a permissible policy determination regarding the temporal scope of information to be considered on remand for resentencing, and that policy determination should inform the Court's analysis of §3553(a)(1), even if Congress' chosen vehicle in §3742(g)(2) is held to be infirm. Cf. *Booker*, 543 U.S., at 263-264 (effectuating congressional preference for appellate review despite excision of §3742(e)); *Oakland Cannabis*, 532 U.S., at 497-498 (prohibiting courts from ignoring Congress' statutorily expressed judgment).

The Government's and Petitioner's invocation of 18 U.S.C. §3661 does not provide the necessary support to include post-sentencing rehabilitation in the "history and characteristics" of the defendant. 18 U.S.C. §3553(a)(1); Gov't Br. 32-37; Pet'r Br. 26-30. Although §3661 states that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" that a court may consider during sentencing, 18 U.S.C. §3661, courts regularly uphold such limitations in a variety of ways. See, *e.g.*, *United States* v. *Dean*, 604 F.3d 169, 174-175 (CA4 2010) (noting impropriety of collateral attacks during sentencing on validity of prior convictions); *United States* v. *Luna*, 332 Fed. Appx. 778, 783 (CA3 2009) (unpublished)

(holding that, despite *Booker*, cultural heritage is not a proper ground for downward variance); *United States* v. *Guzman*, 236 F.3d 830, 832 (CA7 2001) (reversing departure based on cultural heritage).

Moreover, U.S.S.G. §1B1.4, which is derived from §3661, specifies that §3661 must give way to contravening law. U.S.S.G. §1B1.4 ("[T]he court may consider, without limitation, any information concerning the background, character and conduct of the defendant, *unless otherwise prohibited by law.*") (citing 18 U.S.C. §3661) (emphasis added). Because §3742(g) plainly prohibits consideration of post-sentencing rehabilitation, see *supra* Part II.A, §3661 cannot be used to backdoor such evidence in a remand for resentencing.

Additionally, the legislative history of the predecessor to §3661, 18 U.S.C. §3577,[9] demonstrates that the "no limitation" language was intended to enhance judges' authority to consider a broader scope of evidence relating to the past conduct of defendants, driven by concerns over the spread of organized crime and a perceived need for greater flexibility to impose higher sentences. See Pub. L. No. 91-452, 84 Stat. 922 (1970).

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[9] 18 U.S.C. §3577 was renumbered as 18 U.S.C. §3661, without comment, as part of the SRA. Pub. L. No. 98-473, §212(a)(1), 98 Stat. 1987 (1984).

The Government and Petitioner also rely on §3553(a)(2), which articulates overall sentencing objectives, but that provision similarly fails to authorize consideration of post-sentencing rehabilitation. See 18 U.S.C. §§3553(a)(2)(A)-(D). A critical factor under §3553(a)(2) is "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. §3553(a)(2)(A). The plain language of this provision associates the need to impose an appropriate sentence with the criminal conduct of conviction, rendering irrelevant post-sentencing rehabilitative efforts. *Id.*; see also *Irey*, 612 F.3d, at 1225 (reversing sentence that failed to reflect seriousness of offense or to provide just punishment).

Post-sentencing rehabilitation is likewise an inappropriate fit under §3553(a)(2)'s directives to consider deterrence and the need to protect the public from further crimes of the defendant. 18 U.S.C. §§3553(a)(2)(B), (C). The Court discussed these factors in *Gall*, distinguishing the defendant's self-motivated rehabilitation—which occurred not only pre-sentencing, but also significantly pre-arrest—from rehabilitation that would have been "at the direction of, or under supervision by, any court." *Gall*, 552 U.S., at 59. The Court concluded that the district court's reliance on the defendant's pre-sentencing rehabilitation as a §§3553(a)(2)(B) and (C) factor was justified because it was undertaken "on [Gall's] own initiative." *Ibid.* Post-sentencing rehabilitation, by

contrast, as demonstrated by Petitioner's case, comes at the direction or under the supervision of the Court, even if thoroughly embraced by the defendant at that juncture, as occurred in Petitioner's case. For that reason, it is not a valid consideration under §3553(a)(2) and should be considered, when relevant, under other procedural mechanisms Congress designed for this purpose. See *infra* Part III.[10]

III. Other Procedural Mechanisms Exist To Account for Post-Sentencing Rehabilitation.

Post-sentencing rehabilitation can be a relevant factor in determining how a defendant serves his or her sentence, but the grave procedural inequities in allowing courts to consider such evidence at resentencing compel consideration of this factor at different stages. See U.S.S.G. §5K2.19 cmt. background.

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[10] Nor does subsection (D) of §3553(a)(2), which discusses "needed educational or vocational training, medical care, or other correctional treatment," 18 U.S.C. §3553(a)(2)(D), support consideration of post-sentencing rehabilitation. These "treatment" factors, by their plain terms, would not authorize a reduced sentence on remand to reward a defendant who has already completed a rehabilitation program and for whom further substance-abuse education and care is not a "needed" sentencing consideration. *Id.* Regardless, as previously discussed with other §3553(a) factors, the subsequent passage of §3742(g)(2) confirms that Congress did not intend to expand the temporal scope of resentencing proceedings to include factors like post-sentencing rehabilitative success that were unavailable at the original sentencing.

Indeed, Congress saw fit to enact several procedural mechanisms that allow every defendant—not only those who get the benefit of resentencing proceedings—the opportunity to benefit from exemplary post-sentencing rehabilitative efforts. See *Rhodes*, 145 F.3d, at 1384 (Silberman, J., dissenting) (describing how Congress' passage of the SRA "chose to take account of a defendant's rehabilitative efforts in a different and more limited way than it had under the parole system").

First, a defendant can earn "good time" credit as evaluated by the Bureau of Prisons (BOP). Pursuant to 18 U.S.C. §3624, the BOP may reduce the term of imprisonment of a defendant who has shown "exemplary compliance with institutional disciplinary regulations," including progress toward earning a degree. 18 U.S.C. §3624(b). The BOP, being closer to the actual conduct and behavior of the defendants in its custody, is in a better position than the courts to incentivize prisoners to comply with institutional regulations and earn good time credit for rehabilitative efforts. See *Barber* v. *Thomas*, 130 S.Ct. 2499 (2010) (holding that the intent of §3624(b) was to allow BOP to enforce the connection between good behavior and the award of good time); *Sims*, 174 F.3d, at 913 (determining that consideration of post-sentencing rehabilitation would encroach on the authority of the BOP). The Government itself acknowledges that allowing courts to consider post-sentencing rehabilitation as a basis for downward

variance could duplicate the BOP's evaluation and render §3624(b) redundant. See Gov't Br. 50; see also *United States* v. *Hasan*, 245 F.3d 682 (CA8 2001) (finding that permitting a downward departure at resentencing based on post-sentencing rehabilitation would lead to "double counting" of the same efforts).

Petitioner correctly observes that the BOP cannot consider post-release conduct, see Pet'r Br. 48-49, however, Congress also designed a mechanism that allows sentencing courts to consider post-release, post-sentencing rehabilitation. That occurs in §3583(e)(1), which instructs courts to consider the §3553(a) factors when considering early termination of a term of supervised release. 18 U.S.C. §3583(e)(1); see also *United States* v. *Lussier*, 104 F.3d 32, 34-35 (CA2 1997) (holding that court may terminate, extend, or alter the conditions of the term of supervised release prior to its expiration pursuant to §3583(e)); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 400-401 (1991) (same). Because every defendant is eligible to benefit from a court's consideration of post-sentencing rehabilitative efforts in terms of supervised release, §3583(e) does not present the same procedural inequities that militate against permitting courts to consider post-sentencing rehabilitation at resentencing.

Finally, pursuant to the Federal Rules of Criminal Procedure, courts are authorized to reduce a defendant's sentence by considering post-sentencing

substantial assistance through a motion by the Government. FED. R. CRIM. P. 35(b). The Eighth Circuit has held that such Rule 35 motions are consistent with 18 U.S.C. §3742(g); moreover, the court may reduce a sentence beyond the statutory minimum under 18 U.S.C. §3553(e) and Rule 35(b)(4). See *Mills*, 491 F.3d, at 742 (considering plain language of §3742(g) and holding that the government retained authority to make recommendations under §3553(e)); see also *United States* v. *Poole*, 550 F.3d 676, 680-681 (CA7 2008) (consideration of a Rule 35(b) motion should take the statutory sentencing factors into account). Indeed Petitioner's sentence was reduced after his second resentencing proceeding through the district court's consideration of the Government's post-sentencing Rule 35 motion. S.J.A. 60-61.

Far from overlooking the role post-sentencing rehabilitation has to play in a rational and individualized sentencing system, Congress carefully designed mechanisms that expressly allow consideration of this factor by multiple branches of the penal system. The Court should decline the invitation to judicially interject an additional stage at which to consider post-sentencing rehabilitation that would render Congress' objectives in §§3624(b) and 3583(e)(1) redundant or superfluous at best, and, at worst, magnify unwarranted sentencing disparities and inequitable sentencing procedures in the criminal justice system.

CONCLUSION

The Court should affirm the Eighth Circuit's judgment.

Respectfully submitted,

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